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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1894.

No. ~~555~~. 254

THE UNION NATIONAL BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JULY 29, 1893.

(15,363.)

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a In the Supreme Court of the United States, October Term, A. D. 1893.

THE UNION NATIONAL BANK OF CHICAGO, Plaintiff in Error, *vs.* LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Defendant in Error.	A Writ of Error to the Supreme Court of Illinois.

Now comes The Union National Bank of Chicago, plaintiff in error, by Henry S. Robbins, its attorney, and says that in the proceedings in the above-entitled cause and in the foregoing record thereof there is manifest error in this:

1st. The supreme court of Illinois erred in denying the right of plaintiff in error to recover in said cause as it was authorized to do by the act of Congress establishing national banks, passed June 3, 1864, and the amendments thereto, and sec. 5197 U. S. Rev. Statutes, 1878.

2nd. The said court erred in not adjudging as the law of the case the first proposition of law requested by plaintiff in error and in not reversing the judgments of the circuit court of Cook county and of the appellate court of Illinois for the first district for refusing to so hold.

3rd. The said court erred in not adjudging as the law of the case the second proposition of law requested by plaintiff in error
b and in not reversing the judgments of the circuit court of Cook county and of the appellate court of Illinois for the first district for refusing to so hold.

4th. The said court erred in adjudging as the correct law of the case the proposition of law submitted by defendant in error and held by the said circuit and appellate courts and in not reversing said judgments because of said errors.

5th. The supreme court of Illinois erred in affirming and in not reversing the judgment of the said circuit and appellate courts and remanding the case with directions to enter judgment for plaintiff for the amount claimed by it.

6th. The supreme court of Illinois erred in not entering judgment for plaintiff in error for the amount claimed by it upon the stipulation of facts.

7th. The supreme court of Illinois and said appellate and circuit courts erred in not adjudging that the plaintiff in error, being a national bank, could recover from defendant in error, being a corporation, any rate of interest agreed upon.

8th. The judgment of the supreme court of Illinois is contrary to the law and the facts as recited in the stipulation of facts, and it is otherwise insufficient and invalid.

And the said Union National Bank of Chicago, plaintiff in error, prays that the judgments of said supreme court and said appellate and circuit courts may be reversed, annulled, and altogether held for naught, and that this court may enter a judgment for plaintiff

in error upon the stipulation of facts herein for the amount claimed by it, or in default thereof may remand said cause to said State court, with direction to enter said judgment or for a new trial.

UNION NATIONAL BANK OF CHICAGO,
By HENRY S. ROBBINS, *Its Attorney.*

c UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the supreme court of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said supreme court, between Union National Bank of Chicago, plaintiff, and Louisville, New Albany and Chicago Railway Company, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Union National Bank of Chicago, plaintiff, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourteenth day of August, A. D. 1893, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of July, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 118th year.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. Union Nat'l Bank of Chicago, plaintiff in error, *vs.* Louisville, New Albany and Chicago R'y Co., defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office.

d In the Supreme Court of Illinois, Northern Grand Division.

UNION NATIONAL BANK OF CHICAGO *vs.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY. } No. 3051. Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, do hereby certify that on the fifteenth day

of July, in the year A. D. 1893, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this fifteenth day of July, A. D. 1893.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk Supreme Court.

e UNITED STATES OF AMERICA, *ss:*

To Louisville, New Albany & Chicago Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein The Union National Bank of Chicago is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the hon. the chief justice of the supreme court of the State of Illinois this 26th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

DAVID J. BAKER,
Chief Justice Ill. Sup. C't.

Due service of the foregoing citation is hereby duly accepted and the clerk is hereby directed to enter in said cause the appearance of George W. Kretzinger as attorney for said defendant in error.

G. W. KRETZINGER.

f In the Supreme Court of Illinois, Northern Grand Division.

UNION NATIONAL BANK OF CHICAGO *vs.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.	No. 3051. Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, do hereby certify that on the fifteenth day of July, in the year A. D. 1893, a copy of the foregoing citation and return was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this fifteenth day of July, A. D. 1893.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk Supreme Court.

g In the Supreme Court of Illinois, Northern Grand Division

UNION NATIONAL BANK OF CHICAGO
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

No. 3051. Appeal from Appellate Court of Illinois, First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to seventy, inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court to be hereunto affixed, at Ottawa, in said State, this fifteenth day of July, in the year of our Lord one thousand eight hundred and ninety-three.

A. H. TAYLOR,
Clerk Supreme Court.

1 At a supreme court begun and held at Ottawa on Tuesday, the seventh day of March, in the year of our Lord one thousand eight hundred and ninety-three, within and for the northern grand division of the State of Illinois.

Present: Joseph M. Bailey, chief justice; —— ——, justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; David J. Baker, justice; Jacob W. Wilkin, justice; Maurice T. Maloney, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the eight day of March, 1893, there was filed in the clerk's office of said court certain transcripts of the record and proceedings of the appellate court of Illinois, first district, and of the circuit court of Cook county, in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Samuel P. McConnell, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 21st day) of March, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and sixteenth.

Present: Honorable Samuel P. McConnell, one of the judges of the circuit court of Cook county, State of Illinois; J. M. Longenecker, state's attorney; James H. Gilbert, sheriff.
Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 12th day of October, A. D. 1891, there was filed in said court a certain præcipe for summons, and thereupon there issued out of said court and under the seal thereof the people's writ of summons directed to the sheriff of Cook county to execute; which said præcipe and said summons, together with the return of the sheriff thereon endorsed, are in the words and figures following, to wit;

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County, —— Term, A. D. 188–.

UNION NATIONAL BANK OF CHICAGO, a Corporation, Plaintiff,		
3	*vs.*	Assumpsit. Damages, $10,000.00.
LOUISVILLE, NEW ALBANY AND CHICAGO Railway Company, a Corporation, Defendant.		

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises to the damages of said plaintiff in the sum of ten thousand and no — dollars. Direct the same to the sheriff of Cook county to execute and make it returnable to the November term of said court, A. D. 1891.

WILLITS, ROBBINS & CASE,
Plaintiff's Attorney-.

To Henry Best, Esq., clerk.
Chicago, October 12th, 1891.

No. 96105.
Filed October 12, 1891.

HENRY BEST, *Clerk.*

4 STATE OF ILLINOIS, } ss.:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Louisville, New Albany and Chicago Railway Company, a corporation, &c., if it shall be found in your county, personally to be and to appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said Cook county, on the third Monday of November, 1891, to answer unto Union National Bank of Chicago, a corporation, &c., in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars.

And have you then and there this writ, with an indorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of our said court, and the seal
[SEAL.] thereof, at Chicago aforesaid, this 12th day of October, A. D. 1892.

HENRY BEST, *Clerk.*

5 G. D. No. 96105. Circuit court of Cook county, Nov'b'r term, A. D. 189*1*. Union Nat'l Bank *vs.* Louisv., N. A. & Chi'o R'y Co. Summons, alias. Filed this — day of ——, 189–. —— ——, clerk. Willits, Robbins & Case, pl'ff's att'ys. Rec'd — o'clock — m. Dec. 7, 1891. James H. Gilbert, sheriff. P'd, 10. The within writ received too late for service this 7th day of December, 1891. James H. Gilbert, sheriff, by Frank McShaine, deputy.

And afterwards, to wit, on the 30th day of November, A. D. 1891, there was filed in said court a certain declaration, which is in the words and figures following, to wit:

6 In the Circuit Court of Cook County, —— Term, A. D. 188–.

STATE OF ILLINOIS, } ss.:
Cook County, }

Union National Bank of Chicago, a banking corporation organized and existing under the national banking laws of the United States, plaintiff in this suit, by Willits, Robbins & Case, its attorneys, complains of The Louisville, New Albany and Chicago Railway Company, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant heretofore, to wit, on the tenth (10th) day of October, in the year of our Lord one thousand eight hundred and ninety-one, at ——, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of ten thousand ($10,000.00) dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant

and at the special instance and request of the said defendant, and, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

7 And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last-aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff aver- that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of ten thousand ($10,000.00) dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further sum of ten thousand ($10,000.00) dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant, and in the like sum for other money by the

8 said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant, and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said

defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of ten thousand ($10,000.00) dollars of like lawful money as aforesaid, and, being so found in arrears and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the
9 place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of ten thousand ($10,000.00) dollars, and therefore the said plaintiff brings suit, etc.

WILLITS, ROBBINS & CASE,
Plaintiff's Attorneys.

Copy of Account Sued On.

Louisville, New Albany & Chicago R'y Co. to Union National bank, Dr.

To goods, wares, and merchandise sold and delivered.	$10,000 00
To money lent and advanced.....	10,000 00
To money paid, laid out, and expended.....	10,000 00
To money had and received to and for the use of said plaintiff	10,000 00
To money due for interest and forbearance.....	10,000 00
To labor, services, and material.....	10,000 00
To balance due on account stated.....	10,000 00

10 *Plaintiff's Affidavit of Amount Due.*

Circuit Court of Cook County, —— Term, A. D. 18—.

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

—— ——, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for —, and that there is due to the plaintiff from the defendant, after allowing to — all just credits, deductions, and set-offs, — dollars.

—— ——.

Subscribed and sworn to before me this — day ——, 189–.

—— ——.

96105. Circuit court, Cook county. Union Nat'l Bank *vs.* Louisville, N. A. & Chicago R. R. Co. *Narr.* Common counts, with affidavit. Filed Nov. 30, 1891. Henry Best, clerk. Willits, Robbins & Case, p't'ff's att'y-.

11 And afterwards, to wit, on the 7th day of December, A. D. 1891, there issued out of said court and under the seal thereof the people's alias writ of summons, directed to the sheriff of Cook county to execute; which said alias writ, together with the return of the sheriff thereon endorsed, is in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss.*:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Louisville, New Albany and Chicago Railway Company, a corporation, &c., if it shall be found in your county, personally to be and to appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said Cook county, on the third Monday of December, 1892, to answer unto Union National Bank of Chicago, a corporation, &c., in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of our said court, and the [SEAL.] seal thereof, at Chicago aforesaid, this 7th day of December, A. D. 1891.

HENRY BEST, *Clerk.*

12 G. D. No. 96105. Circuit court of Cook county, Dec. term, A. D. 1891. Union Nat'l Bank *vs.* Louisville, N. A. — Chicago R'y Co. Summons. Filed Dec. 17, 1891. Henry Best, clerk. Willits, Robbins & Case, pl'ff's att'y-. Rec'd — o'clock — m., Dec. 7, 1891. James H. Gilbert, sheriff. P'd 1.00.

Served this writ on the within-named defendant, Louisville, New Albany and Chicago Railway Company, a corporation, &c., by delivering a copy thereof to W. H. Lewis, secretary of said company, the 9th day of December, 1891, the president of said company not found in my county.

JAMES H. GILBERT, *Sheriff,*
By W. A. JENKINS, *Deputy.*

13 And thereupon, on the 22nd day of December, A. D. 1891, there was filed in said court a certain plea, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.:
Cook County, }

In the Circuit Court of Cook County, to the December Term, A. D. 1891.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY
als.
THE UNION NATIONAL BANK OF CHICAGO, ILLINOIS. } Assumpsit.

And the said defendant, The Louisville, New Albany & Chicago Railway Company, by G. W. Kretzinger, its attorney, comes and defends the wrong and injury when, etc., and says that it did not undertake or promise in manner and form as the said plaintiff has above thereof complained against it; and of this it puts itself upon the country, etc.

G. W. KRETZINGER,
Defendant's Attorney.

And afterwards, to wit, on the 16th day of January, A. D. 1892, certain proceedings were had and entered of record and certain additional pleas were filed in said court; which said proceedings and said additional pleas are in the words and figures following, to wit:

14 *Order, Jan'y 16, '92.*

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY. } 96105. Assumpsit.

On the stipulation of the parties to this suit it is ordered that leave be, and is hereby, given said defendant to file an additional plea herein instanter.

STATE OF ILLINOIS, } ss.:
Cook County, }

In the Circuit Court of Cook County, to the December Term, 1892.

THE UNION NATIONAL BANK OF CHICAGO
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO. } Assumpsit.

Additional Pleas.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, this defendant, for any sum, because this defendant sayeth that the said plaintiff is a national bank existing under and by virtue of the laws of Congress and subject to all the provisions, prohibitions, and restrictions therein contained; that the several supposed causes of action in the said declaration and each count thereof mentioned

are one and the same, to wit, the supposed cause of action in the first count of the declaration mentioned, and not different
15 causes of action, and that before the making of the promises in that count mentioned, to wit, on etc., in etc., it was corruptly and unlawfully agreed between the plaintiff and the defendant that the plaintiff should lend to the defendant the sum of one hundred and fifty thousand dollars ($150,000) and should forbear the same, to wit, for the space of six months from that day, to wit, September 17th, 1890, and that for the loan and forbearance of said sum of money as aforesaid the plaintiff should retain six per cent. out of the said sum of one hundred and fifty thousand dollars, and the defendant should pay in addition thereto two and one-half per cent. commission, making in all eight and one-half per cent. that the defendant should pay to the plaintiff as interest on the said loan and out of and on said sum of money from the date last aforesaid, and that to secure the payment as aforesaid of the said sum of one hundred and fifty thousand dollars of money and the discount of six per cent. thereon included therein and so taken therefrom by the said plaintiff the defendant should make and deliver its promissory note therefor to the plaintiff.

And the defendant further says that thereupon, on the day first aforesaid, in pursuance of said corrupt and unlawful agreement, the plaintiff there loaned to the defendant the said sum of one hundred and fifty thousand dollars and deducted and retained six per cent. thereof, and that this defendant executed and delivered to said plaintiff its promissory note for the said full sum of one hundred and fifty thousand dollars, which was fully paid and dis-
16 charged by it at the maturity thereof long before the commencement of this suit, and that the said suit is brought to recover, in addition to said six per cent. so taken, retained, and received by said plaintiff as aforesaid for said loan and the forbearance thereof as aforesaid, two and one-half per cent.; and the defendant avers that the said sum of six per cent. so deducted, received, and retained by said plaintiff as aforesaid and said two and a half per cent. now claimed and sued for in this proceeding as aforesaid exceed the rate of seven dollars for the forbearing of one hundred dollars for one year, contrary to the form of the laws of Congress regulating, controlling, and limiting national banks touching the charge and receipt of interest in like cases; by means whereof and by force of said statute the said supposed promises in said declaration and each count thereof mentioned and alleged *is* wholly void in law, and this the defendant is ready to verify. Wherefore defendant prays judgment if the plaintiff ought to have its aforesaid action against it, etc.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, this defendant, for any sum whatever, because this defendant says that the plaintiff is located and transacting its entire business in the city of Chicago, county of Cook and State of Illinois, and is a national bank existing under and by virtue of the laws of Congress and subject to all provisions, prohibitions, and restrictions therein

contained, and especially the following provisions contained in said law of Congress, to wit (section 5197 under the title
17 of national banks, Revised Statutes of the United States for 1878:) "When no rate is fixed by the laws of the State or Territory or district the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run."

SECTION 5198. "The taking, receiving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon."

That this defendant is a corporation organized and existing under the laws of the State of Illinois and Indiana; that there is no law in the State of Illinois fixing or limiting the rate of interest which this defendant as such corporation may agree to pay, and this defendant as such corporation is expressly exempted and excluded from the law of the State of Illinois fixing and limiting the rate of interest as to private persons and making the excess of such rate usury; by reason whereof said provisions and limitations provided in the laws of Congress as aforesaid apply and expressly prohibit said plaintiff as such national bank from charging or receiving interest to exceed the rate of seven per centum per annum; and defendant further avers that the several supposed causes of action in said declaration and each count thereof mentioned are one and the same, to wit, the supposed cause of action in the first count of said declaration mentioned and not different causes of action, and that before the making of the promises in that count mentioned, to wit, on, etc., and in the
18 city of Chicago, county and State aforesaid, it was corruptly and unlawfully agreed between the plaintiff and the defendant that the plaintiff should lend to the defendant the sum of one hundred and fifty thousand dollars and should forbear the same, to wit, for the space of six months from that date, to wit, from the 17th day of September, 1890, and that for the loan and forbearance of said sum of money as aforesaid the plaintiff should retain six per cent. as and for interest out of the said sum of one hundred and fifty thousand dollars, and that in addition thereto the defendant should secure for said plaintiff the deposits of the Chicago & Western Indiana Railroad Company, and in failing to secure said Chicago & Western Indiana Railroad Company as a depositor for said Union National bank then this defendant should pay the further sum of two and one-half per cent. for said loan and forbearance as aforesaid, and that to secure the payment as aforesaid *to* the said sum of one hundred and fifty thousand dollars of money and the interest discount of six per cent. thereon, which was included therein and was to be taken therefrom by the said plaintiff, the said defendant should make and deliver its promissory note therefor to the said plaintiff; and defendant further says that thereupon, on the day first aforesaid, in pursuance of said corrupt and unlawful

agreement and in violation of the provisions of the laws of Congress aforesaid, the plaintiff there loaned to the defendant the sum of one hundred and fifty thousand dollars and deducted and retained as and for interest six per cent. thereof, and that this defendant executed and delivered to said plaintiff its promissory note for the said full sum of one hundred and fifty thousand dollars,
19 which was fully paid and discharged by it at the maturity thereof, long before the commencement of this suit; that the said defendant did not secure said Chicago & Western Indiana Railroad Company as a depositor of said plaintiff, and that this suit is brought to recover, in addition to said six per cent. so taken and retained by said plaintiff as aforesaid, said sum of two and one-half per cent. as aforesaid, and the defendant avers that the said sum of six per cent. so deducted, received, and retained by said plaintiff as aforesaid and said two and one-half per cent. now claimed and sued for in this proceeding as aforesaid exceed the rate of seven dollars for the loan and forbearance of one hundred dollars for one year and exceeds the rate of seven per centum, contrary to the form and provisions of the laws of Congress regulating, controlling, and limiting said plaintiff as a national bank in its charge and receipt of interest, as heretofore averred, charged, and shown; by reason whereof and by force of the said laws of Congress the said supposed promises in said declaration and each count thereof mentioned and alleged *is* wholly void in law, and this the defendant is ready to verify. Wherefore it prays judgment if the plaintiff ought to have its aforesaid action against it, etc.

G. W. KRETZINGER,
Def't's Att'y.

20 And afterwards, to wit, on the 14th day of April and the 16th day of June, A. D. 1892, the following, among other, proceedings were had and entered of record in said court, to wit:

Order, Apr. 14, '92.

UNION NATIONAL BANK OF CHICAGO *vs.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.	96105.	Assumpsit.

This cause being called for trial, come the parties, by their attorneys, respectively. Thereupon, on the agreement of said parties made in open court, this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced and being fully advised in the premises, finds the issues for the defendant. Whereupon the plaintiff submits herein its motion for a new trial in said cause. After arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied.

Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor.

Thereupon the plaintiff, having entered its exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed upon filing herein its appeal bond in the penal sum of two hundred and fifty dollars, to be approved by the court, together with
21 its bill of exceptions, within sixty days from this date.

Order, June 16, '92.

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY. } 96105. Assumpsit.

On the stipulation of the parties to this suit filed herein it is ordered that the appeal bond to the appellate court be filed *nunc pro tunc* as of May 2, 1892.

And thereupon, on the 16th day of June, A. D. 1892, there was filed *nunc pro tunc* as of May 2nd, 1892, a certain appeal bond, which is in words and figures as follows, to wit:

Know all men by these presents that we, the Union National Bank of Chicago, as principal, and David Kelly, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the Louisville, New Albany and Chicago Railway Company, also of the same county and State, in the penal sum of two hundred and fifty and no-100 dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this second day of May, A. D. 1892.

The condition of the above obligation is such that whereas the said Louisville, New Albany and Chicago Railway Com-
22 pany did, on the fourteenth day of April, A. D. 1892, in the circuit court of Cook county, in the State aforesaid, and of the March term thereof, A. D. 1892, recover a judgment against the above-bonden Union National Bank of Chicago for the costs of suit, from which judgment of the said circuit court of Cook county the said Union National Bank of Chicago has prayed for and obtained an appeal to the appellate court within and for the first district in said State:

Now, therefore, if the said Union National Bank of Chicago shall duly prosecute its said appeal with effect, and, moreover, pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against it in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION NATIONAL BANK, [SEAL.]
By DAVID KELLY, *Vice-pres.* [SEAL.]
AUG. BLUM, *Cashier.* [SEAL.]
DAVID KELLY. [SEAL.]

[Union Nat'l B'k Seal.]

Approved May 2d, 1892.

S. P. McCONNELL, *Judge.*

23 Be it remembered that on the 24th day of May, A. D. 1892, there was filed in said court a certain bill of exceptions as follows:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

THE UNION NATIONAL BANK OF CHICAGO }
vs. } Assumpsit.
LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. }

Be it remembered that on the fourteenth day of April, 1892, the said cause coming on for trial and the said perties having in open court waived a trial by jury and agreed to try said cause before the court, it was stipulated as follows:

"It is stipulated by the perties hereto that the issues in this cause may be deemed to have been made and joined as to the special pleas filed herein the same as if formal replications of denial had been filed to each traversable fact averred in said pleas and joinder of issue thereon by the defendant according to pleading and practice in this State, and that the similiter of plaintiff to defendant's general issue is hereby waived by defendant."

And thereupon, said cause coming on for trial before Judge Samuel P. McConnell, the said parties, for the purpose of said trial in open court, stipulated to the following agreed statement of facts:

"On or about September 17th, 1890, William L. Breyfogle,
24 then president of the Louisville, New Albany & Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of one hundred and fifty thousand dollars ($150,000) to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred (300) bonds of the general gold bonds of the Louisville, New Albany & Chicago Railway Company, said bonds being in the denomination of one thousand dollars each.

"It was verbally agreed in this arrangement that the bank should discount from this one hundred and fifty thousand dollars interest at the rate of six (6) per cent. per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago & Western Indiana Railway Company as a depositor with said Union National bank, and in case he failed so to do the said bank should have in lieu of such deposit a commission of two and one-half per cent. upon said $150,000 in addition to said six per cent. thereon. The deposits of the Chicago & Western Indiana Railway Company would have been valuable to the said bank as a part of its business, and it declined to make the said loan except upon the terms above stated.

"After this arrangement had been thus agreed upon Mr. Lewis, the treasurer of the railroad company, filled out a note for one hundred and fifty thousand dollars, dated September 17th, 1890, pay-

able six months after date to the order of the Union National bank, describing the collateral security and providing that after maturity the note was to draw interest at the rate of eight per cent. per
25 annum, a copy of which note is hereto attached and marked 'Exhibit A.'

"After this note had been duly prepared by Mr. Lewis and executed by the railroad company he took the note to the bank, and the bank accepted said note and placed the amount thereof, less the interest for six months at the rate of six per cent., as above stated, to the credit of the said railroad company. Upon the maturity of said note said loan was extended for thirty days by a further note of the same amount, prepared by Mr. Lewis in the manner as the first note was prepared and delivered by him, a copy of the said second note being hereto attached and marked 'Exhibit B.'

"Upon the delivery of this second note to the bank the first note was cancelled in the following words, 'Union National bank, Chicago, 23 March, 1891; paid,' and returned to the railroad company.

"Upon the maturity of this second note the same was paid to the bank by the treasurer of the railroad company according to its tenor and effect, and upon such payment said second note and the three thousand dollars of bonds therein named as collateral security were returned to the said treasurer as the proper officer of said railroad company to receive the same, and said second note was marked canceled and paid, as appears upon the copy thereof hereto attached. The Chicago & West Indiana Railway Company was not secured as a depositor with the said bank, nor has any part of the said commission of two and one-half per cent. been paid."

26 EXHIBIT A.

$150,000.00. CHICAGO, ILLINOIS, *Sept. 17th*, 1890.

Six months after date, for value received, we promise to pay the Union National Bank of Chicago or order one hundred and fifty thousand dollars in gold coin or U. S. notes or Treasury notes, which are a legal tender, at its office in Chicago, with interest at the rate of eight per cent. per annum after due, having deposited with it as collateral security (being the legal holder) for the payment thereof and also for all other present or future demands of any kind of the said bank against the undersigned, due or not due—

Three hundred thousand dollars ($300,000) general mortgage gold bonds of the Louisville, New Albany and Chicago Railway Company, being 300 bonds of $1,000 each, Nos. 11196 to 11495, inclusive—

The market value of which is now $—. Said bank has the right to call for additional security satisfactory to it, and if the same is not furnished on demand may, at its option, declare this note immediately due and payable, without notice to us; and we hereby give the said Union National Bank of Chicago or its assigns full power and authority, on the maturity of this note or at any time thereafter or before, at discretion, to collect or otherwise convert said

securities or either or any part of them or any substitute therefor or any additions thereto, or, in the event of said securities depreciating in value, to sell said collateral securities or any portion thereof at public or private sale, at the discretion of
27 said bank, without advertising the same or otherwise giving notice to us (and the said bank may become the purchaser at any public sale), and said bank shall apply the proceeds, after the payment of all expenses attending said collection, conversion, or sale of the said collateral securities, to the payment of this note, with all interest due thereon, and return the overplus, if any, to us, and in case the proceeds of said collection, conversion, or sale of said collateral security shall not cover the principal, interest, and expenses we promise to pay the deficiency forthwith.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.,
By WM. L. BREYFOGLE, *President.*
W. H. LEWIS, *Secretary.*

[Written across the face in red ink:] Union National bank, Chicago, 23 Mar., 1891. Paid.

EXHIBIT B.

$150,000.00. CHICAGO, ILLINOIS, *March 20th*, 1891.

Thirty days after date, for value received, we promise to pay the Union National Bank of Chicago or order one hundred and fifty thousand dollars in gold coin or U. S. notes or Treasury notes, which are a legal tender at its office in Chicago, with interest at the rate of 8 per cent. per annum after due, having deposited with it as collateral security (being the legal holder) for the payment thereof, and also for all other present or future demands of any kind of the said bank against the undersigned, due or not due—

$300,000 of general mortgage bonds of the Louisville, New Albany & Chicago Railway Company, being 300 bonds of
28 $1,000 each, Nos. 11196 to 11495, inclusive—

The market value of which is now $—. Said bank has the right to call for additional security satisfactory to it, and, if the same is not furnished on demand, may, at its option, declare this note immediately due and payable without notice to us; and we hereby give the said Union National Bank of Chicago or its assigns full power and authority, on the maturity of this note or at any time thereafter or before, at discretion, to collect or otherwise convert said securities or either or any part of them or any substitutes therefor or any additions thereto, or, in the event of said securities depreciating in value, to sell said collateral securities or any portion thereof at public or private sale, at the discretion of said bank, without advertising the same or otherwise giving notice to us, and the said bank may become the purchaser, at any public sale, and said bank shall apply the proceeds, after the payment of all expenses attending said collection, conversion, or sale of the said col-

lateral securities, to the payment of this note, with all interest due thereon, and return the overplus, if any, to us, and in case the proceeds of said collection, conversion, or sale of said collateral security shall not cover the principal, interest, and expenses we promise to pay the deficiency forthwith.

LOUISVILLE, NEW ALBANY &
CHICAGO R'Y CO,
By WM. L. BREYFOGLE, *President.*
W. H. LEWIS, *Sec. & Tr.*

[Written across the face in red ink:] Union National Bank of Chicago, 23 Mar., 1891. Paid.

29 Which was all the evidence offered or *received* upon the trial of said cause.

And thereupon the counsel for plaintiff submitted to the court and requested the court to hold the same as the law in the decision of the case the two following written propositions of law:

1. The court finds as a matter of law that no corporation organized under the laws of Illinois can interpose the defence of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks.

2. The court finds as a matter of law that if, in consideration of the making of the loan in controversy by the plaintiff to the defendant, the defendant agreed that, in addition to paying six per cent. interest on said loan, it would secure the Chicago & Western Indiana Railway Company as a depositor of plaintiff, which said deposit account would have been of value to plaintiff, or, failing to secure such account, would pay plaintiff a commission of two and one-half per cent. on said loan, in addition to said six per cent. interest, this would not constitute usury or defeat a recovery by plaintiff, unless it should appear by a preponderance of the evidence that such arrangement was a mere shift or cover or device to evade the statute against usury or the provisions of the national banking act, or that such was the intent or purpose of the parties or one of them.

But the court refused to hold as law either of said propositions, but refused both of them and marked on each "refused;"
30 to which decision of the court counsel for plaintiff then and there duly excepted.

Thereupon the counsel for defendant presented to the court and requested the court to hold as the law in the decision of said cause the following written proposition of law:

The court holds as a matter of law that a national bank in Illinois has no legal right or authority to charge or receive interest in this State to exceed the rate of eight per cent., and that the statute of this State which denies to corporations the right to plead usury cannot expand the authorities of national banks touching this subject as conferred by and fixed in the national banking act.

Thereupon the court endorsed the same as "held," and adjudged the said proposition to be the correct law in the decision of

the said cause; to which decision of the court the plaintiff, by its counsel, then and there duly excepted.

The foregoing were all the propositions of law held or refused by the court upon such trial.

Thereupon the court found the issues for the defendant as elsewhere appears of record; to which finding of the court in favor of the defendant the plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff made and duly filed its written motion for a new trial; which motion was as follows:

"And now comes said plaintiff, by its attorneys, Willits, Robbins & Case, and moves the court to set aside the verdict rendered
31 therein and grant a new trial in this cause, and for grounds of its motion the plaintiff shows to the court the following, to wit:

"1. The court erred in refusing the first and second propositions of law requested by the plaintiff.

"2. The court erred in holding the proposition of law requested by the defendant.

"3. The verdict is contrary to the law and the evidence.

"4. The proceedings are otherwise erroneous."

And thereupon the court denied said motion for a new trial and gave judgment for the defendant; to which decision of the court in denying said motion the plaintiff, by its counsel, then and there duly excepted.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiff tenders this *their* bill of exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case, which is done accordingly this 24 day of May, A. D. 1892.

S. P. McCONNELL, [SEAL.]
Judge of Circuit Court.

Presented May 24th, 1892.

S. P. McCONNELL, *Judge.*

32 Gen'l No., 96105. Term No., 14985. In the circuit court, Cook county. Union National bank *vs.* Louisville, New Albany — Chicago R'y Co. Bill of exceptions. Filed May 24, '92. Henry Best, clerk. Willits, Robbins & Case, counsellors-at-law, Home Insurance b'ld'g, 205 La Salle St., Chicago, Illinois, att'ey-for pl'ff.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

UNION NATIONAL BANK OF CHICAGO
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY. } Assumpsit.

It is hereby stipulated by and between the parties hereto that the original bill of exceptions in the above-entitled cause may be transmitted to the appellate court for the first district of Illinois by the clerk of said circuit court in lieu of a copy thereof, in accordance with the statute in such case made and provided.

33 G. W. KRETZINGER,
Defendant's Att'y.
WILLITS, ROBBINS & CASE,
Attorneys for Plaintiff.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record, except the bill of exceptions, the original of which is incorporated herein by stipulation of the parties hereto, in a certain cause lately pending in said court, on the common-law side thereof, between Union National Bank of Chicago, plaintiff, and Louisville, New Albany & Chicago Railway Company, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 16th day of September, 1892.

[COURT SEAL.] HENRY BEST, *Clerk.*

34 In the Appellate Court for the First District of Illinois, October Term, 1892.

UNION NATIONAL BANK OF CHICAGO, Appellant,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Appellee. }

Assignment of Errors.

Now comes The Union National Bank of Chicago, appellant herein, and assigns the following errors in the foregoing record:

1. That the court erred in not holding as the law of the case the first and second propositions of law submitted by appellant.

2. The court erred in holding as the law of the case the proposition of law submitted by the appellee.

3. The court erred in finding the issues in favor of the appellee.

4. The court erred in not setting aside the finding and granting appellant's motion for a new trial.

5. The court erred in entering judgment in favor of the appellee and against the appellant.

6. The record is otherwise erroneous.

WILLITS, ROBBINS & CASE,
Attorneys for Appellant.

35 In the Appellate Court, First District, Illinois.

UNION NATIONAL BANK, Appellant,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO. } No. 4505. Appeal — Cook Circuit.

I, Thomas G. McElligott, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 4th day of October, A. D. 1892, by said appellant.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal of said court, at Chicago, this 11th day of February, A. D. 1893.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court, First District, Illinois.

36 At a term of the appellate court begun and held at Chicago on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-two, within and for the first district of the State of Illinois.

Present: Hon. Joseph E. Gary, presiding justice.
" " Henry M. Shepard, justice.
" " A. N. Waterman, justice.

Thomas G. McElliott, clerk; James H. Gilbert, sheriff.

Be it remembered that on the 18th day of November, A. D. 1892, it being one of the days of said October term, A. D. 1892, certain proceedings were had in said court and entered of record in words and figures following, to wit:

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. } 4505. Appeal — Cook Circuit.

This cause having this day been reached in the call of the docket on stipulation of the parties herein it is ordered that said appellant may have until November 22nd, 1892, in which to file a reply brief in said cause, and it is further ordered that said *said* cause be, and is hereby, taken under advisement on briefs filed and to be filed herein.

37 And be it further remembered that afterwards, to wit, on the eighth day of December, A. D. 1892, a judgment was rendered in said cause in said appellate court and entered of record in the words and figures following, to wit:

UNION NATIONAL BANK OF CHICAGO, Appellant,
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY, Appellee.
} No. 4505. Appeal — Cook Circuit.

On this day come again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said Louisville, New Albany & Chicago R'y Co., appellee, recover of and from the said Union National Bank, appellant, its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

38 And thereupon, on the 22nd day of December, A. D. 1892, the following proceedings were had and entered of record in said cause, to wit:

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.
} No 4505. Appeal — Cook Circuit.

This day came appellant, by its counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois, and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the northern grand division of said supreme court, on condition that appellant doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of two hundred and fifty dollars, with surety thereto, to be approved by this court.

And afterwards, on the 4th day of January, A. D. 1893, the following order was made and entered of record in said cause, to wit:

UNION NATIONAL BANK
vs.
LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.
} 4505. Appeal — Cook Circuit.

39 This day came appellant, by its counsel, and presented its certain appeal bond in said cause in the penal sum of two hundred and fifty dollars, with John J. P. Odell as surety

thereto, and the court, being fully satisfied as to the qualifications of said surety, doth order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And afterwards, on the same day, to wit, the 4th day of January, A. D. 1893, an appeal bond was filed in said cause in the words and figures as follows, to wit:

Know all men by these presents that we, the Union National Bank of Chicago, as principal, and John P. Odell, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the Louisville, New Albany and Chicago Railway Company, also of the same county and State, in the penal sum of two hundred and fifty and no-100 dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 28th day of December, A. D. 1892.

The condition of the above obligation is such that whereas the said Louisville, New Albany and Chicago Railway Company did on the 14th day of April, A. D. 1892, in the circuit court of
40 Cook county, in the State aforesaid, and of March term thereof, A. D. 1892, recover a judgment against the said Union National Bank of Chicago for costs of suit, from which said judgment of the circuit court of Cook county the said Union National Bank of Chicago prayed for and obtained an appeal to the appellate court within and for the first district of said State; and whereas the said appellate court did on the eight- day of December, A. D. 1892, and at the October term thereof, A. D. 1892, affirm the judgment of the circuit court aforesaid and did render judgment against the above-bounden Union National Bank of Chicago for costs of suit, from which order of affirmance and judgment of the said appellate court the said Union National Bank of Chicago has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Union National Bank of Chicago shall duly prosecute its said appeal with effect and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against it, said Union National Bank of Chicago, in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION NATIONAL BANK OF CHICAGO, [SEAL.]
By J. J. P. ODELL, *Pres.* [SEAL.]
AUG. HUNT. [SEAL.]
JOHN J. P. ODELL. [SEAL.]

I, Thomas G. McElliott, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify
41 that the foregoing is a true copy of the final order and judg-

ment and all other proceedings and appeal bond of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 11th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.]

THOMAS G. McELLIOTT,
Clerk of the Appellate Court of the First District.

In the Supreme Court of Illinois, Northern Grand Division, March Term, A. D. 1893.

UNION NATIONAL BANK OF CHICAGO, Appellant,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Appellee.

Now comes The Union National Bank of Chicago, appellant herein, and assigns the following errors in the foregoing record:

1. That the appellate court erred in affirming the judgment of the circuit court.

42 2. The appellate court erred in not reversing the judgment of the circuit court and remanding the case to the circuit court with directions to enter judgment in favor of appellant.

3. The appellate court erred in not reversing the judgment of the circuit court and remanding the cause to said court for a new trial.

4. The record is otherwise erroneous.

WILLITS, ROBBINS & CASE,
Attorneys for Appellant.

43 And afterwards, to wit, on the 16th day of March, A. D. 1893, certain proceedings were had and orders made by said court and entered of record, among which is found the following, viz:

UNION NATIONAL BANK OF CHICAGO
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.
No. 128. Appeal from First District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and that said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said

cause is here submitted for the consideration and judgment of the court—

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

44 And afterwards, to wit, on the ninth day of May, A. D. 1893, the same being in vacation after the term of court aforesaid, the following proceedings were, by said court, had and entered of record, to wit:

UNION NATIONAL BANK OF CHICAGO *vs.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY. } No. 128. Appeal from Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error—

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

45 Be it remembered that afterwards, to wit, on the ninth day of May, 1893, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

UNION NATIONAL BANK OF CHICAGO *vs.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD COMPANY. } No. 128. Error to —. Appeal from First District.

Statement.

This was a suit in assumpsit brought by the Union National Bank of Chicago against the Louisville, New Albany and Chicago Railway Company, a corporation existing under the laws of the State of Illinois. To the declaration, which consisted of the common counts, including a count for interest, the defendant pleaded non-assumpsit and two special pleas.

By the first plea it was alleged, in substance, that the plaintiff is a national bank existing under the laws of Congress; that the several causes of action in the declaration set forth are one and the same, viz., the cause of action alleged in the first count; that before the making of the promises in the count mentioned it was corruptly

and unlawfully agreed between the plaintiff and defendant that the plaintiff should loan to the defendant the sum of $150,000,
46 and should forbear the same for the period of six months from that day, and that for such loan and forbearance the plaintiff should retain six per cent. of the $150,000, and that in addition thereto the defendant should pay two and one-half per cent. commission, making, in all, eight and one-half per cent. to be paid by the defendant as interest on the loan, and that to secure the payment of the $150,000 and the six per cent. discount the defendant should make and deliver to the plaintiff its promissory note therefor; that in pursuance of this unlawful and corrupt agreement the plaintiff then and there loaned to the defendant the sum of $150,000, and deducted and retained six per cent. thereof, and the defendant executed and delivered to the plaintiff its promissory note for the full sum of $150,000, which was fully paid at maturity, and that this suit is brought to recover the two and one-half per cent. in addition to the six per cent. so taken and retained by the plaintiff; that the six per cent. deducted and the two and one-half per cent. now sued for exceed the rate of $7 for the forbearance of $100 for one year, contrary to the laws of Congress in relation to national banks, by means whereof and by force of the statute the promises in the declaration alleged are wholly void in law.

The second special plea sets out the provisions of section 5197 and 5198 of the Revised Statutes of the United States, and alleges, in substance, that there is no law in the State of Illinois fixing or limiting the rate of interest which the defendant, as a corporation,
may agree to pay, the defendant being expressly exempted
47 and excluded from the law of the State fixing the rate of interest; that by reason thereof the provisions and limitations provided by the laws of Congress apply and expressly prohibit the plaintiff, as a national bank, from charging or receiving interest to exceed the rate of seven per cent. per annum; that the several causes of action alleged in the declaration are one and the same, viz., the one alleged in the first count; that before the making of the promises in that count alleged it was corruptly and unlawfully agreed between the plaintiff and defendant that the plaintiff should lend to the defendant $150,000 and should forbear the same for six months from that date, to wit, from September 17, 1890, and that for such loan and forbearance the plaintiff should retain six per cent. as for interest out of the $150,000, and that in addition thereto the defendant should secure for the plaintiff the deposits of the Chicago and Western Indiana Railroad Company and in case of failure to secure for the plaintiff that company as a depositor the defendant should pay the further sum of two and one-half per cent for said loan and forbearance; that to secure the payment as aforesaid of the $150,000 and the interest discount of six per cent. thereon the defendant should make and deliver its promissory note therefor to the plaintiff; that on the day aforesaid, in pursuance of said corrupt and unlawful agreement and in violation of the provisions of the laws of Congress, the plaintiff then and there loaned to the defendant $150,000 and deducted therefrom as interest six

per cent. thereof and the defendant executed and delivered to the plaintiff its promissory note for $150,000, which it fully paid
48 and discharged at maturity; that the defendant did not secure the Chicago and Western Indiana Railroad Company as a depositor of the plaintiff, and this suit is brought to recover, in addition to the six per cent. so taken and retained by the plaintiff, the two and one-half per cent. aforesaid.

The cause coming on for trial before the court, a jury having been waived, it was stipulated by the parties that issues in the cause should be deemed to have been made and joined as to the special pleas the same as if formal replications denying each traversable allegation had been filed. The cause was then tried by the court upon the following facts admitted by stipulation:

"On or about September 17, 1890, William L. Breyfogle, then president of the Louisville, New Albany & Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of one hundred and fifty thousand dollars to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred bonds of the general gold bonds of the Louisville, New Albany & Chicago Railway Company, said bonds being in the denomination of one thousand dollars each.

"It was verbally agreed in this arrangement that the bank should discount from this one hundred and fifty thousand dollars interest at the rate of six per cent. per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago & Western Indiana Railway Company as a depositor with said Union National bank and in case he failed so to do the said bank should have in lieu of such deposit a commission of
49 two and one-half per cent. upon said $150,000 in addition to said six per cent. thereon. The deposits of the Chicago & Western Indiana Railway Company would have been valuable to the said bank as a part of its business and it declined to make the said loan except upon the terms above stated.

"After this arrangement had been thus agreed upon Mr. Lewis, the treasurer of the railroad company, filled out a note for one hundred and fifty thousand dollars, dated September 17th, 1890, payable six months after date to the order of the Union National bank, describing the collateral security and providing that after maturity the note was to draw interest at the rate of 8 per cent. per annum, the note being as follows:

"$150,000. CHICAGO, ILLINOIS, *Sept. 17th*, 1890.

"Six months after date, for value received, we promise to pay the Union National Bank of Chicago or order one hundred and fifty thousand dollars in gold coin or U. S. notes or Treasury notes which are a legal tender, at its office, in Chicago, with interest at the rate of eight per cent. per annum after due, having deposited with it as collateral security (being the legal holder) for the payment thereof and also for all other present or future demands of any kind of the said bank against the undersigned, due or not due, three hundred thousand dollars general mortgage gold bonds of the Louisville,

New Albany and Chicago Railway Company, being 300 bonds of $1,000 each, Nos. 11196 to 11495, inclusive, the market value
50 of which is now $——. Said bank has the right to call for additional security satisfactory to it, and if the same is not furnished on demand may, at its option, declare this note immediately due and payable, without notice to us; and we hereby give the said Union National Bank of Chicago or its assigns full power and authority, on the maturity of this note or at any time thereafter or before, at discretion, to collect or otherwise convert said securities or either or any part of them or any substitutes therefor or any additions thereto, or in the event of said securities depreciating in value to sell said collateral securities or any portion thereof at public or private sale, at the discretion of said bank, without advertising the same or otherwise giving notice to us (and the said bank may become the purchaser at any public sale), and said bank shall apply the proceeds, after the payment of all expenses attending said collection, conversion, or sale of the said collateral securities, to the payment of this note, with all interest due thereon, and return the overplus, if any, to us, and in case the proceeds of said collection, conversion, or sale of said collateral security shall not cover the principal, interest, and expenses we promise to pay the deficiency forthwith.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.,
(Signed) By WM. L. BREYFOGLE, *President.*
W. H. LEWIS, *Secretary.*

"Union National bank, Chicago, 23 Mar., 1891. Paid.

"After this note had been duly prepared by Mr. Lewis and
51 executed by the railroad company he took the note to the bank and the bank accepted said note and placed the amount thereof, less the interest for the six months, at the rate of 6%, as above stated, to the credit of the said railroad company. Upon the maturity of said note said loan was extended for thirty days by a further note of the same amount, prepared by Mr. Lewis in the manner as the first note was prepared and delivered by him, that note being similar in form with the one above set forth.

"Upon the delivery of this second note to the bank the first note was canceled in the following words: 'Union National bank, Chicago, 23 March, 1891, paid,' and returned to the railroad company.

"Upon the maturity of this second note the same was paid to the bank by the treasurer of the railroad company according to its tenor and effect, and upon such payment said second note and the three hundred thousand dollars of bonds therein named as collateral security was returned to the said treasurer, as the proper officer of said railroad company to receive the same, and said second note was marked canceled and paid.

"The Chicago & Western Indiana Railway Company was not secured as a depositor with the said bank, nor has any part of the said commission of two and one-half per cent. been paid."

The foregoing being all the evidence offered, the plaintiff sub-

mitted to the court the following propositions to be held as the law in the decision of the case:

"1. The court finds as a matter of law that no corporation
52 organized under the laws of Illinois can interpose the defense of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks.

"2. The court finds as a matter of law that if, in consideration of the making of the loan in controversy by the plaintiff to the defendant, the defendant agreed that in addition to paying six per cent. interest on said loan it would secure the Chicago & Western Indiana Railway Company as a depositor of plaintiff, which said deposit account would have been of value to plaintiff, or, failing to secure such account, would pay plaintiff a commission of two and one-half per cent. on said loan in addition to said six per cent. interest, this would not constitute usury or defeat a recovery by plaintiff, unless it should appear by a preponderance of the evidence that such arrangement was a mere shift or cover or device to evade the statute against usury or the provisions of the national banking act, or that such was the intent or purpose of the parties or one of them."

The court refused to hold these propositions, but at the request of the defendant held the following:

"The court holds as a matter of law that a national bank in Illinois has no legal right or authority to charge or receive interest in this State to exceed the rate of eight per cent., and that the statute of this State which denies to corporations the right to plead usury cannot expand the authorities of national banks touching this subject as conferred by and fixed in the national bank act."

The court thereupon found the issues for the defendant,
53 and, after denying the plaintiff's motion for a new trial, gave judgment in favor of the defendant for costs. On appeal to the appellate court that judgment was affirmed, and this appeal is from the judgment of affirmance.

Opinion by BAILEY, *C. J.*:

The judgment of the circuit court was affirmed by the appellate court on the grounds that a recovery by the plaintiff would necessarily involve the admission of evidence of a cotemporaneous parol contract to modify and add to the terms of the written contract. The loan from the plaintiff to the defendant and its terms were evidenced by a promissory note, and that note was an agreement in writing by which the defendant, for the consideration therein expressed by the words "value received," promised to pay the plaintiff, six months after date, the sum of $150,000 in gold coin. The note having been paid and satisfied, the plaintiff now seeks to recover upon a parol contract, made at the same time and upon the same consideration, by which the defendant agreed to pay the *defendant* a further sum, equal to two and one-half per cent. of the money loaned. We are strongly inclined to concur with the appellate court in the view that to enforce such parol contract would violate the well-established rule that where parties have deliberately put

their engagements into writing in such terms as import a legal obligations, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their
54 undertaking was reduced to writing, and that all oral testimony of a previous colloquim between the parties or of conversations or declarations at the time when it was completed must be rejected.

The case does not seem to us to come within the exception frequently recognized, that where it appears that the writing was not intended by the parties as an embodiment of their contract, but of only a part or of some incidental matter connected with it, the rule excluding evidence of a contemporaneous parol agreement does not apply. The transaction between the parties here was a loan of money, to be repaid at a stipulated time, with a stipulated rate of interest. All of these matters are embodied in the note, and the plaintiff is now insisting that in addition to the interest reserved in the note there was a contemporaneous agreement, not embodied in the writing, that a further sum, by way of interest on the loan, was to be paid. If there had been in fact an oral agreement to repay the loan at the end of six months, with eight per cent. interest, and the note had been executed and delivered, as in fact it was, evidencing an agreement to repay the loan six months after date, with six per cent. interest, no one, we think, would claim the oral agreement could be proved. The admission of such evidence would be palpable violation of the rule that an oral cotemporaneous agreement cannot be proved for the purpose of changing the terms of the agreement as reduced to writing; but the case supposed does not seem to us to differ in principal from the one now under consideration.

The oral agreement now sought to be enforced has relation
55 merely to a portion of the interest, and as the agreement for interest was embodied in the note, the oral proof would only tend to show that the actual agreement of the parties in respect to interest was different from the one evidenced by the written agreement.

The point is made in this court, which does not seem to have been urged in the appellate court, that the defendant, by stipulation that there was an oral contract for the payment of the money now sought to be recovered, has waived its right to object to the introduction of evidence of such contract; but, as we are disposed to place our decision on other grounds, we have not deemed it necessary to consider that contention with care or to express any decided opinion in relation to it.

The substantial controversy in the case is whether the agreement to pay the money now sought to be recovered, admitting that such agreement was made, was usurious and therefore void. According to the stipulation, the agreement was in effect that the defendant, in addition to paying the six per cent. interest provided for in the note, should secure for the plaintiff as a depositer the Chicago and Western Indiana Railroad Company, a service which it is admitted would have been of value to the plaintiff, or, in case of his failure so to do,

the plaintiff should be paid, in lieu of such deposit, two and one-half per cent. commission upon the money loaned. There can be no doubt that this payment, though attempted to be disguised under the name of "commission," was in legal effect an agreement to pay a sum additional to the six per cent. as the consideration or
56 compensation for the use of the money borrowed, and is to be regarded as, to all intents and purposes, an agreement for the payment of additional interest.

The defense of usury set up by the pleas is based upon the provisions of the national bank act and not upon the usury laws of this State. Indeed, as is admitted, the defendant, being a corporation, is prohibited by section 11 of our statute, in relation to interest, to interpose the defense of usury under that statute; but the laws of the State are referred to by the national bank act in such way that, in order to determine whether the defense of usury can be set up in any given case under the latter act, the provisions of both statutes must be considered. Sections 5197 and 5198 of the Revised Statutes of the United States, so far as they are material to the questions now under consideration, are as follows:

"SEC. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under the State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory or district, the bank may take, receive, reserve, or charge a rate not to exceed seven per centum, and such interest may be taken in advance, reckoning the days for which the
57 note, bill or other evidence of debt has to run.

"SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carried with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred."

Sections 2, 3, 4, 5, 6, and 11 of the statute of this State in relation to interest, in force at the date of the contract in question, were as follows:

"SECT. 2. Creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties

and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment.

"SECTION 4. In all written contracts it shall be lawful for the parties to stipulate or agree that eight per cent. per annum, or
58 any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation to any other person or corporation in this State, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.

"SECT. 5. No person or corporation shall directly or indirectly, accept or receive, in money, goods discounts or thing in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or things in action, than as above described.

"SECT. 6. If any person or corporation in this State shall contract to receive a greater rate of interest or discount than eight per cent., upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; and all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable.

"SECT. 11. No corporation shall hereafter interpose the defense of usury to any action."

It will be observed that by section 2 of our statute creditors are allowed to receive interest at the rate of six per cent. per annum on money lent to the use of another, and by section 4 it is made lawful in all written contracts to agree that interest at the rate
59 of eight per cent. per annum shall be taken and paid. By section 5 all persons and corporations are prohibited from accepting or receiving, either directly or indirectly, any greater rate for the loan, forbearance, or discount of money than is prescribed in the preceding sections. The rate of interest is thus expressly limited to six per cent. per annum in all cases where the agreement in respect to interest is not in writing, and where the contract is in writing eight per cent. is allowed to be stipulated for and no more, and the reservation of any greater rate of interest than is thus limited by any person or corporation is made unlawful by express statutory prohibition.

But it is urged that the effect of section 11, which prohibits corporations from interposing the defense of usury, is to create an exception in cases where corporations are debtors, so as to take all cases of that character out of the operation of the statute. The theory seems to be that because a corporation cannot set up usury as a defense any person or corporation dealing with a corporation may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that where a cor-

poration is the debtor no rate of interest is fixed by the laws of this State. To this view we are totally unable to yield our assent.

The defense of usury is made by setting up and seeking to enforce the forfeiture or penalty imposed by section 6 of the statute; that doubtless a corporation cannot do; but the force and efficacy of the statute or the binding nature of its prohibitions does not depend upon the penalty which it imposes for disobedience to those
60 provisions. Whatever a statute forbids becomes unlawful, whether a penalty is annexed as a consequence of disobedience or not. While corporations cannot enforce the forfeiture imposed by our usury laws, it does not follow that the statutory prohibition against exacting or paying more than the lawful rates of interest has no application to them. The prohibition is general and applies by its terms to every person or corporation, and no contract, whoever may be the parties to it, can be so framed as to provide for the reservation of more than the rates of interest allowed by the statute without being in contravention of the statute and therefore unlawful.

Nor does it follow that because the debtor who has agreed to pay more than the legal rate of interest is a corporation, and therefore incapable of interposing the defense of usury, the law will treat the contract as valid and enforce it according to its terms. No agreement between parties to do a thing prohibited by law or subversive of any public interest which the law cherishes will be judicially enforced. The general rule, therefore, is that any act which is forbidden either by the common or the statutory law, whether it is *malum in se* or merely *malum prohibitum*, whether indictable or only subject to a penalty or forfeiture, or however otherwise prohibited by statute or the common law, cannot be the foundation of a valid contract. Bishop on Cont., sec. 470, 471, and authorities cited in notes. "If the subject-matter of an agreement be such that a performance of it would either consist in doing a forbidden act or be so connected therewith as to be in *sy*bstance part of the same
61 transaction, the law cannot command the parties to perform such agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is; but at all events it will give no sort of assistance to such a transaction." 3 Am. & Eng. Encyc. of Law, 869. "Where an act is expressly prohibited by statute a contract to perform or in furtherance of the prohibited act is illegal and uninforc-*i*ble." Lawson on Cont., sec. 279; see also cases cited in note 1.

A statute may render an agreement illegal in one of two ways, viz., by express prohibition or by the imposition of a penalty. Anson on Contr., 172. Where the statute does no more than impose a penalty upon the carrying out of the objects of the contract a question has sometimes arisen whether or not the imposition of the penalty of itself amounts to a prohibition, although the weight of authority would seem to be that where a statute provides a penalty for an act a contract for the performance of such act is void, although

the statute does not pronounce it void or prohibit it in express words; but no such question can arise where the statute expressly prohibits the act. In that case the act is necessarily unlawful and a contract for its performance is necessarily void and incapable of enforcement. Our statute in relation to interest contains both prohibition and a penalty. Where the party agreeing to pay illegal interest is a corporation the penalty cannot be invoked in its
62 favor, but the prohibition remains wholly unaffected by the provisions of section 11, which takes from corporations the right to interpose the defense of usury. Farwell *vs.* Meyer, 35 Ill., 40, was a bill in chancery to set aside a judgment by confession upon a judgment note in which more than the maxi-um rate of interest then allowed by law was reserved. As a court of equity will not enforce a penalty, no attempt was made to set up or take advantage of the forfeiture then imposed by the statute for exacting illegal interest. The contract, therefore, was treated precisely as though no penalty of forfeiture were imposed. The court, however, held that the agreement as to interest, being in contravention of the statutory prohibition, was void and incapable of enforcement and that only the rate of interest given by law in the absence of a contract was collectable. On this point it was said: "The legal rate of interest in this State is six per cent., and although parties are allowed to stipulate for a rate of interest not exceeding ten per cent., the privilege thus given must be exercised in conformity to the statute. An agreement which cannot be enforced as it was made will not be enforced at all. Where the parties stipulate for a higher rate of interest than ten per cent. the agreement cannot be enforced as it was made and we cannot substitute for it an agreement which the parties did not make. In such cases the part of the agreement stipulating for a higher rate of interest than six per cent. will not be enforced and the lender or other person contracting for an illegal rate of interest will be allowed (where no forfeiture or
63 penalties are insisted upon) only to recover six per cent. as the measure of the value which our law has established for the use of money where no agreement has been made for a higher rate in conformity with its provisions."

In the present case, then, the section of the statute imposing a penalty may be left out of view as inapplicable, but still the prohibitory part of the statute remains, making it unlawful for any person or corporation to directly or indirectly accept or receive for the loan or forbearance of money any greater rate than six per cent. by oral agreement or greater than eight per cent. where the contract is in writing.

It follows that the rate of interest which may be taken, reserved, or charged, whether the borrower or debtor is a natural person or a corporation, is fixed by the laws of this State, and the case does not come within that provision of section 5197 of the Revised Statutes of the United States which allows national banks to take or charge interest at a rate not exceeding seven per cent., where no rate is fixed by the laws of the State. The rate of interest which may lawfully be contracted for being limited to six per cent. where

the contract is oral and to eight per cent. where it is in writing, whoever the debtor or borrower may be, national banks are by section 5197 of the Federal Statutes limited to the same rates, and by section 5198 the reserving or charging of a greater rate than is fixed subjects the bank reserving or charging the same to a forfeiture of all the interest agreed to be taken, and makes it liable,
64 in case the interest has been paid, to having twice the amount of it recovered back by the party paying the same in an action in the nature of an action of debt.

In the present case six per cent. interest was reserved in the note. Eight per cent. might have been lawfully reserved in such written contract, but it was not. After the reservation, however, of six per cent. by the writing the additional two per cent. or any other rate could not be lawfully reserved or agreed to be taken or paid by parol. The written agreement having provided for the reservation of all that could be lawfully reserved or agreed to be taken by parol, an oral agreement for any further interest was manifestly in violation of the statute.

There can be no doubt that the agreement by the defendant to secure for the bank the Chicago and Western Indiana Railroad Company as a depositor or in case of failure to do so to pay two and one-half per cent. commission upon the $150,000 borrowed was in the nature of an agreement to pay interest upon the loan in addition to the six per cent. per annum reserved in the note. The use of the money was the only possible consideration for such agreement. The bank, through its own officers, loaned its own money directly to the railway company. There is no room for the theory that this extra payment was or was intended to be in any legal sense a commission, although that name was attempted to be applied to it. The transaction was directly between the bank and the railway company, no agent, broker, or go-between being employed who might be entitled to a commission for his services.
65 It necessarily follows that the agreement to furnish the railroad company as a depositor or pay the bank two and one-half per cent. upon the $150,000 was in consideration of the money loaned or it had no consideration whatever.

It is admitted that the proposed deposit, if it had been obtained, would have been of value to the bank as a part of its business. The precise money value to the bank of the deposit is not shown nor is it material so long as it is admitted to be of value. A fair inference may be drawn, however, from the fact that the bank exacted the payment of two and one-half per cent. upon $150,000 in case of failure to secure the depositor; that, in the opinion of the bank and in the estimation of both parties, that was its reasonable cash value. An oral contract to pay any sum of money or to furnish anything of value for the use of the money loaned in addition to the interest reserved in the note was prohibited by the statute of this State, and, that being so, it was prohibited by the Federal statute in relation to national banks.

This suit is brought to recover the extra two and one-half per cent. upon the $150,000, or $3,750, reserved by the oral agreement,

and, adopting this as the measure of the extra interest thus reserved, it is manifest that the entire interest agreed to be paid was much larger than upon any theory of the law was permitted by either the State or Federal statute. The loan was only for six months, and two and one-half per cent. upon the amount loaned was equivalent to interest at the rate of five per cent. for six months. That
66 added to the interest reserved in the note made eleven per cent., a rate forbidden by the statute of this State and by the act of Congress as well. We are of the opinion that the legal conclusion from the admitted facts is that the agreement to pay the money now sought to be recovered is usurious and void. The rulings of the trial court upon the propositions submitted to be held as the law in the decision of the case were all in harmony with this conclusion. We are of the opinion that the judgment of the circuit court is correct and the judgment of the appellate court affirming that judgment will be affirmed.

Judgment affirmed.

67 *The Petition of the Union National Bank of Chicago for a Writ of Error from the Supreme Court of the United States to the Supreme Court of Illinois.*

To the Honorable David J. Baker, chief justice of the supreme court of Illinois:

Your petitioner, The Union National Bank of Chicago, respectfully represents that heretofore, on the ninth day of May, 1893, in a certain cause then pending in the supreme court of Illinois upon an appeal from the appellate court of Illinois for the first district thereof, wherein your petitioner was the appellant and The Louisville, New Albany & Chicago Railway Company was the appellee, a certain order was entered by said supreme court of Illinois affirming the judgment of the said appellate court at the cost of the appellant, and on the same day the opinion of said supreme court was filed in the office of the clerk thereof, and your petitioner presents herewith a duly certified copy of the record of said cause now remaining in the office of the clerk of said court, including the aforesaid opinion, and prays that the same may be examined by your honor in connection with this petition.

Your petitioner further shows that, as from said record will more fully appear, the judgment of the appellate court so as aforesaid affirmed by this court was a judgment affirming that of the circuit court of Cook county in an action in assumpsit begun by your petitioner against said Louisville, New Albany & Chicago Railway Company in the month of October, 1891, for the recovery of a sum of money claimed by the plaintiff to be due it from the defendant as a commission on a loan made by plaintiff to the defendant under an agreement alleged by the defendant to be usurious and illegal under the act of Congress establishing national banks.

68 Your petitioner further shows that by said act of Congress national banks are authorized to take and charge upon any loan "interest at the rate allowed by the laws of the State where

the bank is located." Your petitioner's bank is located in the State of Illinois, and by the laws of that State lenders are allowed to recover from corporations any rate of interest agreed upon. At the trial of said action in the circuit court your petitioner specially claimed the right under said act of Congress to recover from the defendant corporation the interest and commissions provided for in said contract and to make said contract and enforce it according to its terms, but the said circuit court decided adversely to that right and held that your petitioner, because a national bank and controlled by said act of Congres, was not entitled to recover, although any plaintiff not a national bank would have been entitled so to do. Upon the appeals to the appellate and supreme courts your petitioner specially claimed the same right as in the circuit court, but was denied the same. The supreme court is the highest court in said State in which a decision can be had in this suit, and by the affirmance of judgment in said supreme court a final judgment therein was rendered, and the decision was against the right claimed by your petitioner under said act of Congress and expressly denied the same. Wherefore your petitioner avers that there is manifest error in the said record and in the final judgment rendered by the said supreme court of Illinois, and your petitioner says that the said judgment ought to be re-examined in the Supreme Court of the United States upon writ of error.

Your petitioner, therefore, having duly assigned errors upon said record, prays that a writ of error from the Supreme Court of
69 the United States may be allowed your petitioner and may issue in due form of law, directed to the said supreme court of Illinois, commanding said court to send up, under its seal, to the Supreme Court of the United States the record and proceedings in this cause, that a citation may issue in due form of law to the said appellee, and that all other things may be done in accordance with law necessary for the perfecting of your petitioner's said writ of error.

UNION NATIONAL BANK OF CHICAGO,
By HENRY S. ROBBINS AND
WILLITS, ROBBINS & CASE, *Its Attorneys.*

From examination of the foregoing petition and record, I am of opinion that the petitioner, The Union National Bank of Chicago, claims in said suit a right under an act of Congress, and that the decision herein of the supreme court of Illinois is against such right, and that the petitioner is entitled to a writ of error for the review of the judgment herein by the Supreme Court of the United States.

Therefore let such writ issue in this cause upon the filing by the petitioner of a bond in the sum of one thousand dollars, which is herewith submitted to me and approved by me by my signature thereon.

DAVID J. BAKER,
Chief Justice of the Supreme Court of Illinois.

Dated this 26th day of June, 1893.

(Endorsed:) "Filed July 15, 1893. A. H. Taylor, clerk."

70 Know all men by these presents that we, Union National Bank of Chicago and John J. P. Odell, are held and firmly bound unto Louisville, New Albany and Chicago Railway Company in the full and just sum of one thousand dollars, to be paid to the said Louisville, New Albany and Chicago Railway Company, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas the above-named Union National Bank of Chicago has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment of the supreme court of the State of Illinois in a certain suit therein depending, in which said Union National Bank of Chicago was the appellant and said Louisville, New Albany and Chicago Railway Company was the appellee:

Now, the condition of the above obligation is such that if the said Union National Bank of Chicago shall prosecute its said writ of error to effect and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

UNION NATIONAL BANK OF CHICAGO,
By J. J. P. ODELL, *Pres.* [SEAL.]
AUG. BLUM, *Cashier.* [SEAL.]
JOHN J. P. ODELL. [SEAL.]

Sealed and delivered in presence of—
G. W. KRETZINGER,
Def't's Attorney.

O. K.

Approved this 26th day of June, 1893, by—
DAVID J. BAKER,
Chief Justice of the Supreme Court of Illinois.

(Endorsed:) "Filed July 15, 1893. A. H. Taylor, clerk."

Endorsed on cover: Case No. 15,363. Illinois supreme court. Term No., 555. The Union National Bank of Chicago, plaintiff in error, *vs.* The Louisville, New Albany & Chicago Railway Company. Filed July 29th, 1893.

FILED.
JAN 24 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 254.

THE UNION NATIONAL BANK OF THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

G. W. KRETZINGER,
FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

THE UNION NATIONAL BANK OF THE CITY OF CHICAGO, *Plaintiff in Error,* *vs.* THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Defendant in Error.*	Error to Supreme Court of Illinois.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Defendant in error moves the court to vacate the supersedeas heretofore granted in this cause, and to dismiss the writ of error because the record does not disclose any federal question on which the jurisdiction of this court may be invoked to review the judgment of the Supreme court of Illinois.

STATEMENT.

This writ of error was sued out to reverse a judgment of the Supreme court of Illinois, affirming a judgment of the Appellate court for the First district of Illinois, which was an affirmance of the judgment of the Circuit court of Cook county, rendered in favor of the defendant in error.

This action was brought by plaintiff in error against the defendant in error to recover alleged commissions upon a loan made by the plaintiff to the defendant.

The declaration is in the common counts: The first count is for "divers goods, wares and merchandise by the "said plaintiff before that time sold and delivered to the "said defendant," etc. The second count is for "divers "other goods, wares and merchandise sold and deliv- "ered," by plaintiff to defendant. The third count is "for other money by the said plaintiff before that time "paid, laid out and expended for said defendant," etc. The fourth count is for "divers other sums of money be- "fore that time due and owing from the said defendants "to the plaintiff," etc.

On December 22, 1891, defendant filed its plea of the general issue.

Plaintiff and defendant agreed to a statement of facts showing among other things: That defendant verbally arranged with the plaintiff for a loan of $150,000, to be secured by collateral, etc.; that plaintiff should discount defendant's note for that amount at the rate of six per cent. per annum; that the president of the defendant agreed to secure plaintiff, the Chicago and Western Indiana Railway Company, as depositor, and if he failed to do so, plaintiff should have in lieu of such deposit, a commission of two and one-half per cent. upon this $150,000, in addition to said six per cent. thereon. (Rec., 15.) That after this verbal arrangement had been made the treasurer of defendant made a note for $150,000, payable to plaintiff and delivered the same to the plaintiff, which was placed to plaintiff's credit, less the interest for six months at the rate of six per cent. per annum. (Rec., 16.)

After this stipulation of facts had been agreed to the defendant filed two additional pleas of usury, averring that under the National Banking Act, plaintiff as a national bank could not receive from an Illinois corporation more than seven per cent. interest, and that the two and one-half per cent. commission here sought to be recovered, added to the six per cent. received by the plaintiff as interest, constituted a rate of interest in excess of seven per cent. (Rec., 10–13), and therefore its collection and receipt by plaintiff was prohibited by that act.

Jury was waived and trial had by the court. The cause was tried upon the agreed statement of facts heretofore referred to.

Thereupon the court rendered judgment in favor of defendant, from which plaintiff prayed an appeal to the Appellate court of Illinois.

That court affirmed the judgment of the trial court. (See *Union National Bank of Chicago* v. *L. N. A. & C. Ry. Co.*, 46 Appellate Court Reports, page 449.)

Thereupon plaintiff appealed to the Supreme Court of Illinois.

That court affirmed the judgment of the Appellate court.

(See opinion of the Supreme court, Rec., 25.)

I.

The Appellate court held (46 App. Rep., 452) that "the point is made, that the note, being in writing, constitutes the *sole* contract between the parties, and no evidence of any contemporaneous verbal agreement is admissible to vary its terms."

As shown in the submitted facts, the loan was evidenced by a written note, given after the verbal agreement was made. That part of the verbal agreement to pay commissions was not reduced to writing. Upon this ground *alone* the Appellate court affirmed the judgment of the trial court.

The Supreme court, in its opinion, adopted the views of the Appellate court and held (see Rec., 30):

"The oral agreement now sought to be enforced has relation merely to a portion of the interest, and as the agreement for interest was embodied in the note, the *oral proof* would *only* tend to show that the actual agreement of the parties in respect to interest was different from the one evidenced by the *written* agreement."

And, thereon, the Supreme court held that evidence of the verbal agreement, to pay commissions in addition to the interest provided in the written agreement,—the note *was inadmissible*.

This holding defeated plaintiff's action without the aid of any other defense, and it did not involve a federal question in any sense.

The court cited and quoted Sections 5197 and 5198 of the National Banking Act, Sections 2, 3, 4, 5, 6 and 11 of the Illinois Statutes, fixing and controlling rates of interest and contracts relating thereto.

Under these provisions of the Illinois statutes, and with-

out reference to the Federal statute, the Supreme court held that the alleged agreement upon which the plaintiff sought to recover was unlawful and void.

Referring to the Illinois Statute the court said:

"The prohibition is general, and applies by its terms to every person or corporation, and no contract, whoever may be the parties to it, can be so framed as to provide for the reservation of more than the rates of interest allowed by the statute, without being in contravention of the statute and therefore unlawful."

Thereupon plaintiff sued out this writ of error.

In its petition therefor (Rec., 36) it is alleged that this suit was brought to recover "a sum of money claimed by "plaintiff to be due to it from defendant as a commis-"sion upon a loan made by plaintiff to defendant."

Points and Authorities.

This court has uniformily held that it will on its own motion examine the record to see if its jurisdiction affirmatively appears before praceeding fo the merits; *that is its first duty*. That it must find its jurisdiction in the record before it has power to proceed.

Ry. v. *Swan*, 111 U. S., 379, and cases there cited.

To give this court jurisdiction to entertain and determine a cause brought from a state court on writ of error it must affirmatively appear not only that a federal question was involved and was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that such federal question was actually decided, or

that the judgment as rendered could not have been given without deciding it.

De Saussure v. *Gaillard*, 127 U. S., 216, p. 234.
Brown v. *Atwell*, 92 U. S., 327.
Citizens' Bank v. *Board of Liquidation*, 98 U. S., 140.
Chouteau v. *Gibson*, 111 U. S., 200.
Adams v. *R. R. Co.*, 112 U. S., 123.
Detroit City Ry. Co. v. *Guthard*, 144 U. S., 133.
New Orleans W. W. v. *S. R. Co.*, 125 U. S., 18.
Hale v. *Akers*, 132 U. S., 554.
Johnson v. *Risk*, 137 U. S., 300.
Cook Co. v. *Dock Company*, 138 U. S., 635.
Eustice v. *Bolles*, 150 U. S., 361.
Crossley v. *New Orleans*, 108 U. S., 105.

The rule stated and enforced in these cases has been uniformly recognized since the organization of this court.

The Supreme court of Illinois rested its decision upon provisions of the Illinois statute cited and quoted in its opinion. It is true that at the close of its opinion it said:

"This suit is brought to recover the extra two and one-half per cent. upon the $150,000, or $3,750, reserved by the oral agreement, and, adopting this as the measure of the extra interest thus reserved, it is manifest that the entire interest agreed to be paid was much larger than, upon any theory of the law, was permitted by *either* the state or federal statute."

So the defense under the Illinois statute was complete without aid from the Federal act.

The Illinois statute is not before this court for construction or application.

Thus it is clear that if this court reversed the judgment of the Illinois court upon the ground that its view of the Federal statute was unsound, its judgment holding the agreement void under the Illinois statute would still remain in full force.

And again the decision of the Supreme court affirming the judgment of the Appellate court upon the ground that evidence of the verbal arrangement was inadmissible to change or enlarge the terms of the written note, and therefore the question of interest could only be controlled by such note would remain unaffected by any decision this court might make touching the scope and effect of the national banking act, or the provisions thereof cited and quoted by the Supreme court in its opinion.

In *De Saussure* v. *Gaillard*, 127 U. S., 216, *supra*, held:

"Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court. * * * It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground; and it appears that the court did in fact base its judgment on such independent ground and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.'" (See last page of decision.)

Boughton v. *Exchange National Bank*, 104 U. S., 427, was a motion to dismiss a writ of error for want of

jurisdiction. The motion was granted under the rule above stated.

As shown, plaintiff declared on the common counts *alone* under which no federal question could arise.

Dugger v. *Bocock*, 104 U. S., 596, was before this court on a writ of error to the State court of Alabama. Held, at p. 603:

"Here there are no averments in the bill which directly present the validity under the laws of the United States of the payment in Confederate securities, and it may fairly be inferred that the appellants relied upon an entirely different ground for the relief they asked. Such being the case, no federal question was necessarily involved in the decision that has been made."

In *Crossley* v. *City of New Orleans*, 108 U. S., p. 105, held:

"From the statement of the case and the opinion found in the record it is manifest the decision was placed entirely on the ground that the judgment was not collectible under the law as it stood before the acts of 1876 and 1877 were passed. Consequently the case was disposed of before the federal question presented by the pleadings was reached, and that question was not and need not have been decided. Under these circumstances we have no jurisdiction, and the motion to dismiss is granted."

Here, as shown, the decision of the Supreme court was placed upon the grounds:

1st. That evidence of the oral arrangement to pay the commission was not admissible to vary the terms of the written contract.

2d. That the contract was unlawful and expressly prohibited by the statute of Illinois.

3d. That these two questions, controlling the entire

case were decided before the federal question was referred to in the opinion of the Supreme court.

The Supreme court in deciding that the defense was complete under "*either*" the Illinois statute or the national banking act in effect eliminated the latter act and made its construction and application or any reference thereto wholly unnecessary.

In *Adams County* v. *Railway Company*, 112 U. S., 123, it is held that if the record presented *two* questions, *one* federal and one *non*-federal and the judgment of the State court rested upon its decision of the non-federal one, this court had *no* jurisdiction on writ of error.

In *Chouteau* v. *Gibson*, 111 U. S., 200, held: "It is apparent therefore that no federal question which there may have been in the case was decided by the State court, and that the decision of such a question *was not necessary* to the final decree rendered."

In *Eustis* v. *Bolles*, 150 U. S., 366, held:

"It is likewise settled law, that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

Assuming that usury under the national banking act and that usury under the Illinois statute were both relied upon for defense, and plaintiff succeeded in having the defense overruled as to the national banking act, it would not extend to the defense under the Illinois statute.

The ruling of this court is uniform that where the State

court based its decision on a local or State statute, it is the duty of the court to dismiss the writ of error.

Eustis v. *Bolles*, *supra*, and authorities there cited.

The motion to dismiss the writ of error for want of jurisdiction, may be made at any time.

Respectfully submitted.

G. W. KRETZINGER,

For Defendant in Error.

Office Supreme Court U. S.
FILED.
FEB 24 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 254.

THE UNION NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

SUGGESTIONS IN OPPOSITION TO THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

HENRY S. ROBBINS,
COUNSEL FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 53 DEARBORN ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 254.

THE UNION NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

SUGGESTIONS IN OPPOSITION TO THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

The rule of law applicable to this motion has been too firmly established by the decisions of this court to admit of further discussion.

It is conceded that to sustain this writ of error it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to plaintiff in error or that the judgment as rendered could not have been given without deciding it. If this record discloses that, although a federal question was raised and decided

adversely to the plaintiff in error, another question, not federal, was also raised and decided against it, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this motion should be granted. If this record discloses two adequate defenses made in the state court, one involving a Federal question, and the other not, and the state court sustains them both, then this writ of error cannot be sustained, although the Federal question was wrongly decided. In such case the record should affirmatively show that the judgment rested upon the disposition of the Federal question, unless the defense which does not involve the Federal question is so unfounded that it cannot be presumed to have been entertained by the court. It is not the correctness of these principles, but their proper application to the facts of this record, which is raised by this motion.

This is an action at law, by which is sought to be recovered $3,750.00 denominated by the parties commissions, but in reality interest, on a loan by plaintiff in error to defendant in error. The defendant in error resisted recovery upon the ground of usury.

The plaintiff in error being a national bank, its right to take interest, and the limitations upon that right, depend, not upon the state law, but upon the section of the act establishing national banks which provides for the taking of interest by such banks and is section 5197 of the United States Revised Statutes.

This section is as follows:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, *interest at the rate allowed by the laws of the State*, Territory or district *where the bank is located*, and no more, except that where by the laws of any State a different rate is limited for

banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. *When no rate is fixed by the laws of the State* or Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The question of usury as affecting national banks is not a question of state law, but is a Federal question, as has been settled by this court in

Bank v. *Deering*, 91 U. S., 29.
National Bank v. *Johnson*, 104 U. S., 271.

It is true that the above section authorizes national banks in Illinois to take "interest at the rate allowed by the laws" of that state, but this does not make the question in this case any the less a federal question. The question presented by this writ of error is the meaning of the words "interest at the rate allowed by the laws of the state." The interest statute of Illinois first fixes a general maximum rate, and then provides that corporations cannot "interpose the defense of usury" (see statute on pages 8 and 9 of our brief on merits); the result being that lenders in Illinois (other than national banks) are permitted to recover by suit *from corporations* any rate of interest agreed upon.

The question which this writ of error seeks to have decided is whether the words "laws of the state," used in

this section 5197 are to be construed as applying to both of these provisions of the state statute, or, as decided by the state Supreme Court, only to the one which fixes the general rate. This clearly is a Federal question (the construction of a federal statute), and it was decided by the Illinois Supreme Court against the right claimed by plaintiff in error. Usury under the Federal law was, therefore, all that could be raised in this case.

This was the view taken by counsel for defendant in error. It is the only question of usury that was presented in this case. Under the Illinois practice, usury, to be available as a defense, must be *pleaded*. (R. S. of Illinois, Ch. 74, Sec. 7, set out in full on page 9 of our brief on merits.) Defendant in error interposed two pleas of usury. (Rec., 11, 12, 13.) Neither of these set up usury under the state law. Both aver that the agreement is contrary to "the laws of Congress regulating, controlling and limiting national banks touching the charge and receipt of interest." Counsel for defendant in error is, therefore, wrong in saying "that usury under the national banking act, and that usury under the Illinois statute were both relied upon for defense." The only question of usury actually presented by the pleadings is a question of usury under the Federal statute.

From a further inspection of the record this becomes even more apparent. Under the practice in Illinois, where common law actions are tried without a jury, questions of law are separated from questions of fact, not as in the Federal court by special findings of the trial judge, but by submitting to the trial judge written propositions of law applicable to the case, which he is required to accept or reject. (Rev. Stat. of Illinois, Chap. 110, § 41, which is set out on pages 4 and 5 of our brief on merits.)

And in common law cases the Supreme Court of Illinois is confined to a reaxamination of questions of law only. (Section 89, same chapter, printed on page 5 of brief on merits.)

Under this practice the defendant in error submitted, and the trial court held as correct law, the following proposition:

"The court holds as a matter of law that a national bank in Illinois has no legal right or authority to charge or receive interest in this state to exceed the rate of eight per cent., and that the statute of this state which denies to corporations the right to plead usury cannot expand the authorities of the national bank touching this subject as conferred by and fixed in the national banking act."

The plaintiff in error submitted, but the trial court rejected, the following proposition:

"The court finds as a matter of law that no corporation organized under the laws of Illinois can interpose a defense of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks."

The trial court having rendered judgment for the defendant, when the case reached the Supreme Court of Illinois on appeal, the only question of usury presented to it arose upon the action of the trial court upon these propositions. This question under the law and under the pleadings was wholly a question of Federal law. No question of usury under the state law was or could be presented for the decision of the Illinois Supreme Court. All that the Supreme Court of Illinois could decide was whether the trial court erred in its rulings upon the above propositions of law. The Supreme Court decided that the trial court did not err upon these propositions, and *that is the extent of its decision.* All that is found in its opinion on the question of interest or usury was said for the

purpose of leading up to and reaching this conclusion, and must be considered with reference to this conclusion. The record did not present to that court any question of usury under the state law, and that court did not decide such question.

Indeed, it is conceded in the opinion of that court that, if it had been a question of usury under the state law, its decision would have been *not against* but *for* plaintiff in error. That court says:

"The defense of usury set up by the pleas is based upon the provisions of the national banking act, and not upon the usury laws of this state; indeed, as is conceded, the defendant being a corporation, is prohibited by section 11 of our statute in relation to interest to interpose a defence of usury under that statute. But the laws of the state are referred to by the national banking act in such a way that in order to determine whether the defense of usury can be set up in any given case under the latter act the provisions of both statutes must be considered."

(For further discussion of opinion of Illinois court, see pages 26 and 27 of our brief on merits herewith filed.)

Attention is also called in this connection to the certificate of the chief justice of the Illinois Supreme Court approving the issuance of a writ of error in which he certifies that the plaintiff in error "claims in said suit a right under an act of Congress, and that the decision herein of the Supreme Court of Illinois is against such right, and that the petitioner is entitled to a writ of error for a review of the judgment herein by the Supreme Court of the United States." (Rec., 37.)

It will thus be seen that the Illinois Supreme Court fully intended to decide the question of usury, not under the state law, but under the federal statute, and that there is no foundation in this record for the contention of defendant in error that that court decided that

"the defense (of usury) was complete under either the Illinois statute or the national banking act."

The claim of counsel for defendant in error that there is in this record another non-federal question (sufficient to sustain the judgment) which was decided adversely to plaintiff in error by the Illinois Supreme Court will, upon inspection of this record, be found to be equally untenable. The opinion of that court (Rec., 29–36) will show there were three questions suggested for its decision:

First. Whether the note given at the time of the transaction was such a repository of the entire agreement of the parties that evidence of the contemporaneous parol contract to pay the commission or interest sued for was inadmissible to vary, modify or add to the terms of such written contract. This was simply a question of the admissibility of evidence. Upon this question the Illinois Supreme Court was "strongly inclined" to the view that the parol evidence was inadmissible.

Second. Admitting such evidence to be inadmissible when properly objected to, did the defendant in error waive its right to object to it by stipulating what the *real* contract of the parties was?

Third. The question of usury under the Federal statute.

It thus appears that in order to sustain the judgment against plaintiff in error independent of the third or Federal question, the court was obliged to decide against it both the first and second questions. If that court decided the first question against plaintiff in error and the second question in its favor, the judgment in the case could not be against it without deciding the Federal ques-

tion (usury) adversely to it; that is, a decision of the Federal question would be necessary to a judgment rendered by the Supreme Court against the plaintiff in error. So, if that court, although "inclined" to decide the first question against plaintiff in error, did *not* decide the second question *at all*, the judgment in that court against plaintiff in error could not have been given without deciding adversely to plaintiff in error the Federal question. An inspection of the record will show that the court did *not* decide the second question. In reference to it the court said (Rec., p. 30):

"The point is made in this court * * * that the defendant, by stipulation that there was an oral contract for the payment of the money now sought to be recovered, has waived its right to object to the introduction of evidence of such contract, *but, as we are disposed to place our decision on other grounds, we have not deemed it necessary to consider that contention with care or to express any decided opinion in relation to it.* The substantial controversy in the case is whether the agreement to pay the money now sought to be recovered, admitting that such agreement was made, was usurious and, therefore, void."

In other words, the only question really decided by the Illinois Supreme Court is the question of usury, which, as we have seen, is purely a Federal question. The judgment of the Illinois Supreme Court is based wholly upon its decision of that question adversely to the claim of the plaintiff in error, and this makes a plain case for the jurisdiction of this court on writ of error.

For the purpose of more fully informing this court upon the nature of the question really involved in this record, we file contemporaneously with these suggestions our briefs upon the merits, which we respectfully ask may be read in connection with these suggestions upon

the consideration of this motion to dismiss for want of jurisdiction.

For the reasons given above and amplified in the briefs, it is respectfully submitted that the motion to dismiss should be denied.

HENRY S. ROBBINS,
Counsel for Plaintiff in Error.

MAR 16 1896
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

No. 353.—254

THE UNION NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

REPLY TO COUNSEL'S BRIEF AGAINST MOTION TO DISMISS, ETC.

G. W. KRETZINGER,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 555.

THE UNION NATIONAL BANK OF CHICAGO, *Plaintiff in Error,* vs. LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Defendant in Error.*	In Error to the Supreme Court of the State of Illinois.

REPLY TO COUNSEL'S BRIEF AGAINST MOTION TO DISMISS, ETC.,

Counsel entirely misapprehends our position.

At page 4 of his suggestions he makes us contend "that usury under the national banking act and that usury under the Illinois statute were both relied upon for defense." We did not so contend in the Supreme court and the Supreme court of Illinois did not so decide.

Look at the pleadings for a moment: Plaintiff's declaration was in the common counts, to which defendant pleaded the general issue, and two special pleas setting up federal limitations, from which it is manifest that the de-

fense of usury under the state law was not pleaded. But we contend that the general issue put the burden of proof upon the plaintiff to prove by competent evidence a valid contract for the recovery of the additional two and one-half per cent. of interest which he contends the railroad company orally agreed to pay in the name of commissions.

Now turn a moment to sections 2, 3, 4, 5, 6 and 11 of the Illinois statutes, cited and quoted in the opinion of the Illinois Supreme court, attached to the printed transcript (p. 31).

Section 2 fixes the legal rate at six per cent. It applies to all cases where a party to a transaction is entitled to recover interest and the rate has not been agreed and fixed by them in writing.

Section 4 provides that the parties may by written agreement fix a higher rate than six per cent. not to exceed eight per cent. From all of which it clearly follows that the statutory rate is applicable to all unwritten contracts and cannot exceed six per cent., but that there may be a written agreed rate not to exceed eight per cent., and in the absence of a written agreement the statutory rate of six per cent. must control.

So that no oral agreement for a rate in excess of six per cent. and no written agreement for a rate in excess of eight per cent. is lawful or enforcible.

It is manifest therefore that even if section 6 had been omitted from the Illinois statutes the verbal agreement here sued on would have been unlawful and could not have been enforced.

And so the Illinois Supreme court held in this case. Of these sections, including section 5, which prohibits all

persons and corporations from accepting or receiving a greater rate than prescribed in sections 2 and 4, the Supreme court said (Trans., 32):

"By section 5, all persons and corporations are prohibited from accepting or receiving, either directly or indirectly, any greater rate," etc., "than is prescribed in the preceding sections."

The rate of interest is thus expressly limited to six per cent. per annum in all cases where the agreement in respect to interest *is not in writing*, and where the contract is in writing, eight per cent. is allowed to be stipulated for, and *no more*, and the reservation of any greater rate of interest than is thus limited by *any person* or *corporation* is made *unlawful* by *express* statutory prohibition.

Here plaintiff seeks to recover upon an oral agreement. If the agreement had been in writing it could not recover thereon under its common counts, but the Supreme court proceeded:

"The theory seems to be, that because a corporation cannot set up usury as a defense, any person or corporation dealing with a corporation may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that where a corporation is the debtor no rate of interest is fixed by the laws of this state. To this view we are totally unable to yield our assent."

Thus the Supreme court decided against the right of plaintiff to recover in this suit, *without* reference to the national banking act, and further held:

"Whatever a statute forbids becomes unlawful, whether a penalty is annexed as a consequence of disobedience or not."

"While corporations cannot enforce the forfeiture imposed by our usury laws, it does not follow that the stat-

utory prohibition against exacting or paying more than the lawful rates of interest has no application to them. The prohibition is general, and applies by its terms to *every* person *or* corporation, and no contract, whoever may be the parties to it, can be so framed as to provide for the reservation of more than the rates of interest allowed by the statute without being in contravention of the statute *and therefore unlawful.* * * * Nor does it follow that *because* the debtor who has agreed to pay more than the legal rate of interest *is a corporation*, and therefore incapable of interposing the defense of usury, *the law will treat the contract as valid and enforce it according to its terms.* No agreement between parties to do a thing prohibited by law or subversive of any public interest which the law cherishes will be judicially enforced. * * * 'Where an act is expressly prohibited by statute a contract to perform or in furtherance of the prohibited act is *illegal* and *unenforcible.*' Lawson on Contracts, Sec. 279; see also cases cited in Note 1. * * * Our statute in relation to interest contains both prohibition and penalty. Where the party agreeing to pay illegal interest is a corporation the penalty *cannot be invoked* in its favor, *but the prohibition remains wholly unaffected by the provisions of Section II*, which takes from corporations the right to interpose the defense of usury."

The court then cites and approves *Farwell* v. *Meyer*, 35 Ill., 40, which was a bill in chancery to set aside a judgment by confession upon a judgment note in which more than the maximum rate of interest allowed by law was reserved. The court held that agreement unlawful, and therefore void. And thus the case stood as though no agreement touching interest had ever been made which gave the party claiming interest the legal rate of six per cent.

In that case the court held: "In such cases that part of the agreement stipulating for a higher rate of interest than six per cent. will not be enforced, and the lender or

other person contracting for the illegal rate will be allowed (where no forfeitures or penalties are insisted upon) only to recover six per cent. as the measure of value which the law has established for the use of money where no agreement has been made for a higher rate in conformity with its provisions."

In that case the court held that, the agreement between the parties being *put out* of the case because void, the statutory rate of six per cent. applied. Se we contend here.

Look for the moment at the transaction as it appears in the stipulated facts. (Page 15, Trans.)

The original and renewal notes recited "with interest at the rate of eight per cent. per annum *after* due," etc.

It was further stipulated as a fact that the first note was paid by renewal at its maturity, and the second note was fully paid at its maturity. The first note was canceled and returned upon the giving of the second note, and when the second note was paid it was so marked and returned with collaterals to defendant.

Thus there was no written agreed rate for the time, from date to maturity of these notes, and the same having been taken up at maturity, the written agreed rate of eight per cent. never became enforceable.

It further appears from the stipulated facts that when the first note was presented the bank discounted it at the rate of six per cent. from its date to its maturity, and as there was no rate written in the note for that time, the six per cent. discount from the note was at the statutory rate as provided, fixed and limited in the second section of the Illinois statute. Thus under the general issue pleaded by defendant the burden was upon the plaintiff to establish the validity of the contract which the Su-

preme court held it failed to do. The plea of usury and forfeiture of the entire interest was not interposed by the defendant as in the case of *Hartford Fire Ins. Co.* v. *Hayden*, 28 Ill., 260, cited by counsel.

Ry. Co. v. *Miles*, 52 Ill., 174, arose under the acts of 1853 and 1857, and not the act under which the Illinois Supreme court disposed of the question here involved without reference to the national banking act.

Further observe that *Farwell* v. *Meyers*, *supra*, involved a transaction—a written contract between *natural* persons, so that the defense of usury was open to the defendant, but instead of pleading that defense he relied upon the illegality of the contract as here relied upon under the general issue.

In *National Bank* v. *Johnson*, 104 U. S., p. 271, this court finds and measures the rights of the national bank by the laws of New York, as construed and applied to other corporations and to *natural* persons, and this court said, at page 277:

"The sole particular in which national banks are placed on an *equality* with *natural* persons *is as to the rate of interest*, and not as to the character of contracts they are authorized to make. * * * It is not intimated or implied that if, in any state, a *natural* person may discount paper *without* regard to any rate of interest fixed by law, the *same* privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the state law."

We have seen in *Farwell* v. *Meyer*, *supra*, that the court held an agreed rate between natural persons in excess of the statute was unlawful, and the contract void. Adopting the same rule, the Illinois court held in this case that the agreement upon which the plaintiff seeks to recover was for the same reason unlawful and void.

Again, referring to the pleadings we submit that the declaration in the common counts does not present any question involving the rights of the plaintiff depending upon the national banking act, or its construction, and the general plea thereto put in issue the validity of plaintiff's claim, which could be and was tested by the Supreme court wholly and alone by the Illinois statutes.

In *Powell* v. *Brunswick Co.*, 150 U. S., p. 440, it was held:

"If it appeared from the record by clear and necessary intendment that the federal question must have been directly involved, so that the State court could not have given judgment without deciding it, that will be sufficient. * * * The bill of complaint in this case nowhere claimed relief by reason of any right, title, privilege or immunity under the constitution of the United States," etc. "Nor did the petitioner in error to the Court of Appeals suggest any federal question," etc.

Here the plaintiff asserts no right or claim in its declaration dependent for exercise or recovery upon the national banking act, and the plea of general issue simply traverses the existence of any right or claim maintainable under the common counts.

The Illinois court, therefore, was fully justified in resting a sufficient defense against this claim upon the Illinois statutes, without reference to the national banking act, because we contend that all reference in the opinion of the Illinois Supreme court to the national banking law might well be eliminated, and still there would remain an ample defense for defendant against plaintiff's claim, clearly triable under the common counts and plea of general issue.

This court held in *Sayward* v. *Denny*, 158 U. S., p. 185:

"Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved, so that the State court could not have given judgment without deciding it."

Here the Illinois court found ample and sufficient defense upon two grounds:

1st. That the written notes could not be enlarged, changed, or the liability thereon extended by oral testimony.

2d. That the oral agreement touching the additional two and one-half per cent. was void under sections 2, 4 and 5, without reference to sections 6 and 11 of the Illinois statutes, and without any reference whatever to the national banking act and the defense upon these two grounds, not only did not involve the validity of any provision of the national banking act, but their decision did not require any construction or consideration whatever of the national banking act by the court.

Observe also that the stipulation of facts recited an alleged agreement by the defendant with the plaintiff to pay the plaintiff two and one-half per cent. commission, in addition to the six per cent. interest or discount.

As this oral agreement appears in this stipulation of facts the question as to whether it was a device to avoid the Illinois statutory rate, was a question for the Supreme court to determine in giving construction to that agreement, and the Illinois statute, and did not involve, directly or indirectly, a federal question dependent upon the national banking act.

Again, is such an agreement by a national bank con-

templated or authorized by the national banking act? We submit that neither in plaintiff's declaration or in the decision of the Illinois court can such a federal question be found which entitles this court to exercise its jurisdiction in review of this final judgment of the State court, and that the motion to dismiss the writ of error for want of jurisdiction should be allowed.

Respectfully submitted,

G. W. KRETZINGER,

For Defendant in Error.

FILED,
FEB 24 1896

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 254.

THE UNION NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HENRY S. ROBBINS,
COUNSEL FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 53 DEARBORN ST., CHICAGO.

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STATEMENT.

This is a writ of error under section 709 of the U. S. Rev. Statutes to the Supreme Court of Illinois, wherein the plaintiff in error seeks to reverse the decision of that court, which was against the right claimed by plaintiff in error to recover $3,750 as interest under section 5197 of the U. S. Rev. Stat., otherwise known as sec. 30 of chap. 106, Act of June 3, 1864, establishing national banks, which is as follows:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, *interest at the rate allowed by the laws of the State*, Territory or district

where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. *When no rate is fixed by the laws of the State* or Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona-fide* bill of exchange, payable at another place than the place of such purchase, discount or sale at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The controversy arises upon the proper construction of the above words, "interest at the rate allowed by the laws of the state," and, "when no rate is fixed by the laws of the state," where the state statute, as in Illinois, prescribes a general maximum rate of interest (8% in that state), but further provides that "no corporation shall interpose the defense of usury in any action."

This was an action of assumpsit, instituted in the Circuit Court of Cook County, Illinois, by the plaintiff in error, a national bank, against the defendant in error, an Illinois corporation. The declaration consisted of the common counts, including a count for interest; to which the defendant interposed the general issue and two special pleas, in each of which it pleaded usury *under the Federal statute*.

In the trial court a jury was waived, and the case submitted to the court; and upon the trial no evidence was introduced, but in lieu thereof the following stipulation of facts was made and admitted without objection:

"On or about September 17, 1890, William L. Brey-

fogle, then president of the Louisville, New Albany and Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of one hundred and fifty thousand dollars ($150,000) to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred (300) bonds of the general gold bonds of the Louisville, New Albany and Chicago Railway Company, said bonds being in the denomination of $1,000 each.

It was verbally agreed in this arrangement that the bank should discount from this $150,000 interest at the rate of six (6) per cent. per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago and Western Indiana Railway Company as a depositor with said Union National Bank, and in case he failed so to do, the said bank should have in lieu of such deposit a commission of two and one-half per cent. upon said $150,000 in addition to said six per cent. thereon. The deposits of the Chicago and Western Indiana Railway Company would have been valuable to the said bank as a part of its business, and it declined to make the said loan, except upon the terms above stated.

After this arrangement had been thus agreed upon, Mr. Lewis, the treasurer of the railroad company, filled out a note for $150,000, dated September 17, 1890, payable six months after date, to the order of the Union National Bank, describing the collateral security, and providing that after maturity the note was to draw interest at the rate of eight per cent. per annum, a copy of which note is hereto attached and marked "Exhibit A."

After this note had been duly prepared by Mr. Lewis and executed by the railroad company, he took the note to the bank, and the bank accepted said note and placed the amount thereof, less the interest for six months at the rate of six per cent. as above stated, to the credit of the said railroad company. Upon the maturity of said note said loan was extended for thirty days by a further note of the same amount prepared by Mr. Lewis in the manner as the first note was prepared and delivered by him, a copy of the said second note being hereto attached and marked "Exhibit B."

Upon the delivery of this second note to the bank the

first note was canceled in the following words: 'Union National Bank, Chicago, 23 March, 1891, Paid,' and returned to the railroad company.

Upon the maturity of this second note the same was paid to the bank by the treasurer of the railroad company according to its tenor and effect, and upon such payment said second note and the $300,000 of bonds therein named as collateral security were returned to the said treasurer, as the proper officer of said railroad company to receive the same, and said second note was marked canceled and paid, as appears upon the copy thereof hereto attached. The Chicago and Western Indiana Railway Company was not secured as a depositor with the said bank, nor has any part of the said commission of two and one-half per cent. been paid."

The exhibits referred to in the stipulation are, first (Exhibit A), a note of appellee for $150,000, bearing date September 17, 1890, and payable six months after date, to the order of appellant, and drawing interest after maturity at the rate of eight per cent. per annum, and stamped "Paid." Exhibit B is a note of appellee for like amount, bearing date March 20, 1891, and payable thirty days after date, to the order of the appellant and drawing interest after maturity at the rate of eight per cent. which is also stamped "Paid."

Under the practice in Illinois, when actions at common law are tried without a jury, the questions of law are separated from the questions of fact, not, as in the Federal courts by the trial judge's certificate of facts or special findings, but by requiring the trial judge to specifically pass upon any written propositions of law applicable to the case which may be submitted to him. The statutory provision governing this is section 41, chapter 110 of Illinois Revised Statutes, 1874, which reads as follows:

"In all cases, in any court of record of this state, if both parties shall agree, both matters of law and fact

may be tried by the court; and upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court."

This provision furnishes the only method in common law cases other than rulings on the admissibility of evidence, questions of pleading, etc., of presenting upon appeal questions for the decision of the State Supreme Court, as that court by statute is confined to a re-examination of questions of law only.

The statute of Illinois (R. S., Chap. 110, Sec. 88, 89) is as follows:

"§ 88. Appeals from and writs of error to Circuit Courts, the Superior Court of Cook County, the Criminal Court of Cook County, County Courts and City Courts in all criminal cases, below the grade of felony, shall be taken directly to the Appellate Court, * * * and in all cases relating to revenue or in which the state is interested as a party or otherwise, shall be taken directly to the Supreme Court. * * *

§ 89. The Supreme Court shall re-examine cases brought to it by appeal or writ of error as to questions of law only, and no assignment of error shall be allowed which shall call in question the determination of the inferior or Appellate Courts upon controverted questions of fact in any case, excepting those enumerated in the preceding section."

See *Farwell* v. *Shove*, 105 Ill., 61; *People* v. *McCoy*, 132 Ill., 138; *Exchange Bank* v. *Chicago Bank*, 131 Ill., 547.

In the trial court, both parties to this suit availed themselves of this practice; the defendant in error submitted to the Circuit Court the following proposition of law:

"The court holds, as a matter of law, that a national bank in Illinois has no legal right or authority to charge or receive interest in this state to exceed the rate of eight per cent., and that the statute of this state which denies to corporations the right to plead usury cannot expand the authorities of national banks toching this subject as conferred by and fixed in the national banking act."

Which proposition was by the Circuit Court held correct.

The plaintiff in error submitted the following proposition of law:

"The court finds, as a matter of law, that no corporation organized under the laws of Illinois can interpose the defense of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks."

This proposition the Circuit Court rejected, and found the issues for the defendant, in whose favor, after overruling plaintiff's motion for a new trial, the court entered a judgment. From this the plaintiff in error prosecuted its appeal to the Appellate Court of Illinois, and, upon affirmance by that court to the Supreme Court of Illinois. The latter court affirmed the judgments of the lower courts, upon the ground that the rulings of the trial court on the foregoing propositions of law were correct.

The plaintiff in error claims that the Illinois Supreme Court in rejecting the proposition of law submitted by it, and approving the one submitted by defendant in error, misconstrued the above section 5197 of the Federal statute, and thereby denied to plaintiff in error a right to interest to which it was entitled under that section.

The assignments of errors call in question these rulings, and thereunder plaintiff in error makes the following:

POINTS.

I. The contract was not usurious under the Federal statute.

Illinois is not a state wherein under the Federal statute "no rate is fixed."

Tiffany v. *National Bank*, 18 Wall., 409.
Hinds v. *Manual Marmolejo et al.*, 60 Cal., 229.
National Bank v. *Bruhn*, 64 Texas, 571.
Guild v. *First National Bank*, 4 So. Dakota, 566.
Wolverton v. *Exchange National Bank*, 39 Pac. Rep., 247 (1895).
Rockwell v. *Farmers National Bank*, 36 Pac. Rep., 905.

The case of *In re* Wild, 11 Blatchford, 243, holding to the contrary, is not good law.

Farmers Bank v. *Deering*, 91 U. S., 29.

II. Under the clause, "Interest at the rate allowed by the laws of the State," in the Federal statute, no corporation in Illinois can interpose the defense of usury against a National Bank.

R. R. v. *Miles*, 52 Ill., 17.
Hartford Fire Ins. Co. v. *Hadden*, 28 Ill., 260.
American C. R. R. v. *Miles*, 52 Ill., 174.

III. Usury not being established, this court should enter or direct judgment for the plaintiff in error.

Murdock v. *City of Memphis*, 20 Wall., 636.

Daggett v. *Gage*, 41 Ill., 465.

Hills v. *Marlboro*, 40 Vt., 648.

Swatara R. R. Co. v. *Brune*, 6 Gill., (Md.) 41.

I.

UNDER THE FEDERAL STATUTE PLAINTIFF IN ERROR WAS ENTITLED TO RECOVER THIS INTEREST.

Under section 5197 of the Federal statute above quoted, national banks are:

1. Restricted to seven per cent. interest "when no rate is fixed by the law of the state"; and,

2. When a state has legislated upon the subject, national banks are authorized in that state to take interest "at the rate allowed by the laws of the state."

Thus, a reference to the legislation of each state on the subject of interest is necessary to determine what rate of interest a national bank is by the Federal statute permitted to exact in that state. The Illinois statute relating to interest in force at the date of this contract was chapter 74 of Illinois Revised Statutes, which, so far as important here, is as follows:

§2. Creditors shall be allowed to receive at the rate of six (6) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing, on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the

parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay of payment.

§4. In all written contracts, it shall be lawful for the parties to stipulate or agree that eight (8) per cent, per annum, or any less sum of interest, shall be taken and paid upon every one hundred (100) dollars of money loaned or in any manner due and owing from any person or corporation to any other person or corporation in this State, and after that rate for a greater or less sum, or for a longer or shorter time, except as is herein provided.

§ 5. No person or corporation shall directly or indirectly accept or receive, in money, goods, discounts, or thing in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or thing in action, than as above prescribed.

§ 6. If any person or corporation in this State shall contract to receive a greater rate of interest or discount than eight (8) per cent, upon an contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; And all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon, shall be recoverable.

§ 7. The defense of usury shall not be allowed in any suit, unless the person relying upon such defense shall set up the same by plea, or file in the cause a notice in writing, stating that he intends to defend against the contract sued upon or set-off, on the ground that the contract is usurious.

§ 11. No corporation shall hereafter interpose the defense of usury in any action.

1. The first question that arises upon the construction of this state statute is, whether by it "no rate is fixed" in the case of corporations, and hence plaintiff in error is

limited to the seven per cent. prescribed in the Federal statute. This is the contention of the learned counsel for defendant in error as disclosed by his two special pleas and by his arguments thus far. On the other hand it is claimed by plaintiff in error that the expression, "no rate is fixed," does not contemplate the fixing of a *maximum or numerical* rate of interest by the state legislature, but the word "fixed" is synonymous with and is to be read in connection with the word "allowed," in the first clause of section 5197; and that the rate is fixed within the contemplation of this statute whenever the state legislature has affirmatively declared the state policy with respect to the legal rate of interest, as the Illinois legislature clearly has by this statute done in the case of borrowing corporations.

This court has declared the spirit and laid down the true rule of interpretation of this section in the case of

Tiffany v. *National Bank*, 18 Wall., 409.

In the State of Missouri state banks of issue were limited to eight per cent. interest, while other lenders were allowed ten per cent.; and it was contended that a national bank in Missouri was confined to eight per cent. under the exception in the foregoing section 5197, which reads that "where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title." According to the literal reading of this clause, it seems to confine national banks to the rate limited to state banks of issue, whenever that rate was *different* from the general rate, and whether higher or lower than the general rate. This court, however, refused to place this con-

struction upon it, and held a national bank entitled to the *general* rate when higher than the rate fixed for state banks of issue. The reason for this construction is thus stated by Mr. Justice STRONG (p. 412):

"It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same.

"On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking

the place of State banks; the latter have been substantially taxed out of existence. A duty has been imposed upon their issues so large as to manifest a purpose to compel a withdrawal of all such issues from circulation. In harmony with this policy is the construction we think should be given to the thirtieth section of the act of Congress we have been considering. It gives advantage to National banks over their State competitors. It allows such banks to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons."

The Federal statute under consideration is an enabling act, as held in the Tiffany case. It does not *restrict* to certain rates, an inherent power of national banks to take interest. It confers upon them their only power to collect interest. Without it they could charge no interest. It is the exclusive charter of their power. Congress, in conferring this power to take interest, was obliged to fix the scope and extent of that power, that is, to make some provision with respect to the *rate* of interest. In doing this, as in passing the entire act, Congress was governed by a desire to encourage the establishment of national banks under this statute. It might have fixed an arbitrary rate, which should apply to all banks in all sections of the country. This was plainly not feasible, because the rates of interest then prevailing in different states were widely different. If the banks were limited to the rate of interest prevailing in an eastern state, it would have been so far below the rates prevailing in the west as to discourage the establishment of national banks there.

On the other hand, Congress might have adopted as a maximum rate of interest the highest rate prevailing in the west, or might have provided that a national bank might contract with its customers for *any* rate of interest.

This plan was not adopted, obviously because it would have excited antagonism by violating the state policy as to interest as declared by the legislatures of so many of the states. The only remaining course open, and one which would obviate the objections above suggested, was to make the national bank, with respect to the rate of interest, a local institution, and require it as such to conform to the policy of the state where it does business, in all cases where the legislature by affirmative action had declared the state policy. This commercial question having been settled by the state legislature, Congress adopts its judgment. This, as we contend, is what Congress intended in providing in section 5197, that national banks might take "interest at the rate allowed by the laws of the state." The "laws of the state" means legislative enactments.

But this provision by itself was not sufficiently comprehensive, as it had no application to existing states whose legislatures had *not* as yet declared their state policy, nor to new states that might exist for a time without any legislative expression as to the rate of interest. It was to meet this class of cases, and we contend, for that purpose only, that Congress inserted in section 5197 the second clause providing a rate of seven per cent. "when no rate is fixed by the laws of the state." We do not believe that Congress by this section intended to conform to the state policy as to the rate of interest *only* when a *maximum* or numerical rate was fixed, and to violate the state policy when as clearly expressed by legislation which in effect allows parties to contract for any rate of interest.

The contrary view contended for by counsel for defendant in error would make the state

rate prevail when the state statute fixed as a maximum an improbable rate of fifty or one hundred per cent., but would deny the application of a state statute which in effect enacted the same thing by providing that parties might contract for any rate of interest they pleased. This is to make the Federal statute and the rights of national banks dependent upon the *form* of the state legislation.

On the contrary, it was evidently the purpose of Congress to make National Banks independent of state legislation, and to resort to the legislation of a state only so far as necessary to determine the general state policy as to the *rate* of interest.

The question now under consideration has not yet been directly passed upon by this court. It has, however, already been decided by the highest tribunals of the States of Texas, California, Washington, Colorado and South Dakota favorably to the construction contended for by plaintiff in error.

Thus, in *Hinds* v. *Manual Marmolejo et al.*, 60 Cal., 229, the court, in construing this section 5197, says:

"Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word 'fixed' used in the last clause is used in the same sense as the word 'allowed' in the first clause, and that by the words 'the laws of the State or Territory' is meant *statute* laws. In other words, that the true interpretation of the Act of Congress is, that in those States and Territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding seven per centum, while in those States and Territories having a statute on the subject, they are authorized to charge and receive interest at the rate allowed other banks and individuals. From this view it follows that inasmuch as we have in California a statute (Civil Code,

section 1918), providing 'that parties may agree, in writing, for the payment of any rate of interest, and it shall be allowed according to the terms of the agreement until the entry of judgment; the national banks are also allowed to charge and receive such rates of interest as may be agreed on."

In *National Bank* v. *Bruhn*, 64 Tex., 571, the question was whether a national bank of Texas could contract to receive two per cent. per month, all usury laws having been abolished by the Constitution of Texas, and the statutes in force permitting parties to contract for any rate of interest upon which they might agree. The borrower there, like the defendant in error here, claimed that the national bank was confined to seven per cent., under the section now under consideration.

But Chief Justice WILLIE, delivering the opinion of the court, said:

"The general rule established by this section is, that national banks may charge as high a rate of interest as is allowed by the laws of the state or territory where the bank is located. Under this rule, no doubt can exist but the appellant bank was authorized to charge two per cent. per month interest upon the note on suit, as that rate was then allowed by the laws of this state. Was this right restrained by any of the subsequent provisions of the section?"

"The only other clause in the section that regulates the rate is that which provides that, where no rate is fixed by the laws of the state or territory or district, the bank may reserve a rate not exceeding seven per centum. This is no exception to the general rule already stated, but provides for a class of cases not included in it. The rule is that banks may charge as much interest as is allowed by the local laws to any person whatever. The provision we are considering is, in effect, that when no interest is allowed by the local laws to any person, natural or artificial, the national banks may charge and receive seven per cent., and no more. The statute of the

state making no regulations as to what interest may be charged, Congress takes the subject in hand so far as national banks are concerned, and prescribes what rate they may receive. It is clear that this provision does not apply to the case under decision; for, as we have seen, the laws of Texas did not regulate the subject at the time the note was given." * * *

"We are taught by the decisions of the Supreme Court of the United States, that this section is to be liberally construed in favor of national banks; that they are national favorites, and even when the language of the statute would restrict them to a less rate of interest than is allowed to individuals, the intendment of the law must be presumed to have been otherwise."

"In the case of *Tiffany* v. *National Bank of Missouri*, 18 Wall., 409, that court held that the exception limiting national banks to the rate of interest allowed to state banks applied only when this rate was greater than that allowed to others, and not to cases where it was less. Literally construed, the exception seemed to apply in the one case as well as in the other. But the court said that the intention of the law was to give national banks 'a firm footing in the different states where they might be located. It was expected that they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition.' They further said that the intention 'was to allow to national associations the rate allowed by the state to natural persons generally, and to a higher rate if state banks of issue were authorized to charge a higher rate.' It is very evident that this intent would be thwarted if this law be so construed as to allow state banks to charge and receive two per centum per month for money, and at the same time to restrict national banks to seven or eight per centum per annum. We certainly should not so interpret the law where, as in the case of the present statute, the language did not require such interpretation. To hold that the appellant bank could charge no more than eight per cent. on the note in suit, is to decide that it cannot contract for conventional interest, though the banks of the state are allowed to do so. This is directly contrary to the express provisions of the Federal law

which we have cited, in prescribing a general rule by which national banks are to be governed in contracting for interest. *Newell* v. *National Bank of Somerset*, 12 Bush., 57; *Wiley* v. *Starbuck*, 44 Ind., 298. It would also deny to national banks a favorable provision of our interest law, and at the same time extend its benefits to state banking institutions."

"To hold that no more than seven per cent. could be charged upon the note, is to say that at the time it was executed, we had no law in Texas regulating the subject of interest and providing for its allowance of this character, which was not the case. In short, can it be said that a national bank is permitted to contract for interest at a rate allowed by the law of a state, when it cannot charge two per cent, though that rate is authorized by such laws? We think these banks are on a footing with other banks, and that they may contract for the highest rate fixed or allowed by the statutes of the state, and that this is the meaning of the thirteenth section of the national banking act."

In *Guild* v. *First National Bank*, 4 So. Dak., 566 (1894), a statute of the Territory of South Dakota prescribed a rate of interest at twelve per cent. per annum, except in certain counties, wherein it was made lawful to receive any rate agreed upon by the parties. Here it was contended that in these special counties no rate was fixed, and that the seven per cent. rate of the Federal statute controlled national banks. But the court adjudged that to allow parties to receive any rate agreed upon was a fixing of the rate of interest within the meaning of the banking act, and the bank in that case could recover the rate agreed upon. The court, after referring to the case of *Tiffany* v. *Bank*, *supra*, said:

"With this view of the purpose of the national congress in establishing the national banking system, it must have been its purpose and intention to allow national banks to charge and receive as high a rate of interest as the state banks or private banks were allowed to take and

receive. It will not be questioned, we apprehend, that under the territorial law, as amended, territorial or private banks were allowed, as well as individuals and corporations, 'to take, receive, retain and contract for any rate agreed on between the parties.' This being so, national banks were, under this clause, allowed to take and receive any rate of interest agreed on between them and their customers. * * * It seems to us the term 'fixed'; as used in the section, must be construed as substantially a repetition of the term 'allowed'."

Again, in

Wolverton v. *Exchange National Bank*, 39 Pac. Rep., 247 (1895),

under the statute of Washington, which declared "the legal rate of interest shall be ten per cent. per annum," but that "any rate of interest agreed upon by the parties to the contract * * * shall be valid and legal," it was contended that no rate of interest was fixed by the state law, and the national bank in that case was, therefore, confined to the seven per cent. rate mentioned in the Federal statute. But this construction was rejected, and the bank adjudged entitled to any rate agreed upon; the court saying (p. 248):

"It is conceded by respondent that a private banker or individual or state bank could, under the laws of this state, legally receive any rate of interest that might be contracted in writing to be paid; and it seems to us that it was the intention of Congress to place national banks on the same footing, viz: that they should not be permitted to take more nor required to accept less than by the laws of a given state private banks or individuals are permitted to take or receive, but that they should stand on a footing of equality with natural persons or domestic institutions."

Again, in

Rockwell v. *Farmers' National Bank*, 36 Pac., 905.

under a Colorado statute similar to the above statute of Washington the same conclusion was reached in a similar case, the court saying (p. 907):

"The restriction contained in the national banking act which forbade national banks to charge more than seven per cent. only became operative in the absence of state legislation on the subject. Wherever, the state legislature has acted, the general grant of power to banks to charge whatever rate might be reserved either by citizens or banks of issue became operative. Under this construction, banks in Colorado are placed on precisely the same footing as individuals. * * * In common with these other courts which have reached a similar conclusion, we hold that national banks in Colorado stand on the same footing in the matter of interest that other banks and individuals occupy."

These various statutes do not affirmatively fix the rate in the sense of limiting parties to a maximum or numerical rate, but they do negatively establish the rate of interest within the state, by declining to interfere with the agreement of the parties on the subject. Thus is the state policy as to interest clearly defined, and this, according to the foregoing cases, is sufficient to give national banks in these states the benefit of the state law, and exempt them from the restriction of the Federal statute in cases where "no rate is fixed." This is equally true of the Illinois statute. While it limits the interest generally, by creating a general maximum rate of eight per cent., it practically takes corporations out of this limitation and makes an exception of them by denying to them the right to interpose the defense of usury, and thus, in effect, allows state banks and individuals to recover from such corporations the agreed rate of interest. This clearly establishes the policy of the State of Illinois with respect to the payment of interest by corporations;

and there is not here presented a case where no rate is fixed by the laws of the state. Indeed, this seems to be the view of the Illinois Supreme Court, which says (Rec., p. 34):

"It follows that the rate of interest * * * is fixed by the laws of this state, and the case does not come within that provision of section 5197 of the Revised Statutes of the United States which allows national banks to take or charge interest not exceeding seven per cent. where no rate is fixed by the laws of the state."

The only authority we have been able to find at variance with the foregoing cases is the early case (so much relied on by defendant in error) of

In re Wild, 11 Blatchford, 243,

which is a case identical with the one at bar, in that the New York statute, like that of Illinois, prohibited a corporation from pleading usury, and in that case the Federal circuit and district judges differed upon the question under discussion. The circuit judge (Woodruff) decided in favor of the construction claimed by the defendant in error here; the district judge, the late Mr. Justice Blatchford, having previously decided in favor of the broader construction now claimed for this section by plaintiff in error.

In determining the weight to be given to the opinion of Judge Woodruff, it is to be noted that *in re Wild* was decided by him in August, 1873. He did not, therefore, have the benefit of the decision of this court in *Tiffany* v. *National Bank of Missouri*, *supra*, which was decided in September of that year.

The weight to be given to this decision of Judge Woodruff is further lessened by his general misconception of the scope of the national banking act. It was his opin-

ion that the intention of Congress was to adopt the state law as to interest (where one existed) *in toto*, and that, therefore, the penalties prescribed by that state law for the taking of excessive interest applied to national banks. This erroneous view had been previously taken by the New York Court of Appeals in

First National Bank of Whitehall v. *Lamb*, 50 N. Y., 95,

a case upon which Judge Woodruff in part bases his opinion. This view was subsequently repudiated by this court in

Farmers' Bank v. *Deering*, 91 U. S., 29,

where the court decided that the New York statute providing for a forfeiture of the principal in case of usury, and the Federal law providing for the forfeiture of interest only, the Federal law prevailed; and that the only purpose contemplated by Congress in referring to the state law was to get the *rate* of interest.

Again, Judge Woodruff in his opinion places his decision somewhat upon the proposition that the New York act prohibiting corporations from pleading usury was a *repeal pro tanto* of the then existing usury law of New York, and argues from this that in loans to corporations "no rate is fixed" according to the act of Congress. The case upon which he bases this opinion is that of

Rosa v. *Butterfield*, 33 N. Y., 665.

The act prohibiting corporations from pleading usury in New York was an independent act, passed subsequently, and not a part of the interest statute; and Judge Davis, who wrote the opinion in that case, concedes that if the statute in question had been passed as a part of the usury statute, it was to be construed as merely creating exceptions to the

general provisions of the interest act. In Illinois, this provision appears as Sec. 11 of the interest statute of May 24, 1879, and provides an *exception* to the general rule declared by the preceding sections. But it is useless to pursue this further. To adopt this view of Judge Woodruff is to subject these national favorites to unfriendly state legislation, by making their rights depend upon the *form of words* which the state legislature sees fit to adopt.

It follows that Illinois is not a state where "no rate is fixed" in loans to corporations.

2. This case, therefore, falling within that class of national banks which are permitted to receive "interest at the rate allowed by the laws of the state," the second question for consideration arises upon the proper construction of these words. The Illinois interest statute above quoted is not a model of accurate expression. This is doubtless due to the fact that prior to 1874 these provisions were not all found in one statute. While the Illinois Revised Statutes of 1845 contained most of the provisions relating to interest, the inhibition against a corporation pleading usury, which is now section 11, was prior to 1874 an independent act of the legislature, passed February 11, 1853. When these separate provisions relating to interest were, on March 25, 1874, and on May 24, 1879 (When the present law was passed), incorporated into one statute, care was not observed in the blending of the different provisions into one act.

But the use of the word "corporation" in sections 4, 5 and 6, in no way qualifies the operation of section 11, as had been expressly decided under the former law.

R. R. v. *Miles*, 52 Ill., 17.

The only purpose of section 6 of the state statute is to fix the penalty. Under the decision of this court in *Farmers' Bank* v. *Deering*, 91 U. S., 29, such section has no reference to national banks for which the penalty is fixed by the Federal statute.

Resort is to be had to the other sections of the Illinois statutes above set out to determine what is "interest at the rate allowed by the laws of the state," for which these banks may stipulate. The sections of that statute that throw light upon this are:

Section 2, which in certain cases allows creditors, even in the absence of an agreement, to receive interest at six per cent.

Section 4, which makes it lawful for parties to stipulate in written contracts for eight per cent.

Section 5, which prohibits the taking of any greater sum than as above provided.

Section 7, which prohibits the defense of usury, unless made by plea or notice in writing; and

Section 11, which prevents a corporation from interposing the defense of usury.

If resort is to be had only to the second, fourth and fifth sections to determine the interest rate under the Illinois statute, then it is doubtless true, as decided by the Illinois Supreme Court, that national banks in Illinois are confined to eight per cent. in written contracts and six per cent. in verbal contracts. If, on the other hand, the remaining sections, 7 and 11 (the whole act and not certain parts of it), are to be also considered in determining the scope and effect of the legislative enactment, then it is equally true that in Illinois, national banks are entitled to recover by suit from corporations interest at any

rate agreed upon. For in the construction of this statute, indulge in as many refinements as you will, the plain fact remains that in Illinois a private bank or individual may recover from a corporation interest at any rate agreed upon. If plaintiff in error, instead of being a national bank, were a state bank or individual, it would be entitled to judgment in its favor in this suit. This is admitted by the Illinois Supreme Court, which says (Rec., p. 31):

"The defense of usury set up by the pleas is based upon the provisions of the national bank act, and not upon the usury laws of this state. Indeed, as is admitted, the defendant being a corporation, is prohibited by section 11 of our statute in relation to interest to interpose the defense of usury under that statute."

The Illinois Supreme Court in other cases has decided to the same effect, and under the statutory provision, now section 11, has upheld the right of local banks and individuals to recover *from corporations* interest in excess of the rates fixed in the state statute.

Hartford Fire Ins. Co. v. *Hadden*, 28 Ill., 260.

American C. R. R. v. *Miles*, 52 Ill., 174.

Does not that court in deciding against plaintiff in error's right to recover this interest from this corporation violate the rules of interpretation laid down by this court in *Tiffany* v. *National Bank of Missouri*, *supra*, and place national banks in Illinois at a disadvantage in competing not only with state banks but with all other lenders in that state? With a tendency so prevalent of late years to conduct all kinds of business under the form of corporations, it is, we believe, safe to say that one-half of the money loaned in Illinois in commercial pursuits is loaned to corporations. The proportion will doubtless in the

future become greater. Not only state banks but all other lenders may recover interest on these vast loans to corporations at any rate agreed upon, while national banks are, according to the decision of the Illinois Supreme Court, confined to the numerical rates mentioned ois statute.

If this court shall approve this interpretation of the law, these national favorites are at once deprived of the position of equality in competition which this court has demanded for them. Banking capital will derive better remuneration under state charters than through national banks. Such banks are thus exposed to unfriendly state legislation. The state legislature may at any time in its discretion increase the advantage which other lenders in Illinois will thus have over national banks, by enlarging the class of borrowers who are denied the right to plead usury.

If the state statute provided only that interest in excess of eight per cent. should not be taken, except from corporations, it would hardly be contended that the rate thus furnished by the statute for national banks on a loan to a corporation was eight per cent. Wherein is there any difference between such a provision and the present statute, which permits a recovery of an agreed rate of interest from corporations by depriving them of the right to resist it in court? True, in the latter case the legislation is not as direct, but it is equally as effective. Is it safe to allow a construction of this Federal banking act, which would make the right of national banks in a state depend upon the form of words which the state legislature sees fit to adopt? Does not this place the national banks in the power of the state legislature? Should not we look at the substance and effect of the state legislation rather

than to its form? Can, in any other way, national banks be kept on a footing of entire equality with other lenders with respect to the recovery of interest?

There is much refinement of reasoning indulged in by the learned judge who delivered the opinion of the Illinois Supreme Court. A distinction is made by him between a penalty or forfeiture and a prohibition. He says the prohibition of the statute is general, and the argument seems to be that section 5197 of the Federal statutes is to be construed by reference only to this general prohibition and independent of sections 7 and 11 of the state statute, which, with reference to corporations, in part at least, qualifies the general prohibition. But, in construing the Federal statute, we must consider practical results and not be diverted by refinements of logic and senseless differences of definition. This distinction which he makes may be pertinent in some cases.

For instance, it may be that sections 7 and 11 only apply to cases in which the debtor corporation is *defendant*, as it is only in such cases that it can set up the *defense* of usury by plea or notice in writing under the Illinois practice. It may, therefore, be that where the debtor corporation is plaintiff either in a suit in equity or at common law, the general prohibition applies to it. It may be that sections 7 and 11 only apply where the debtor is defendant in a common law action, as it is only in such actions that the notice in writing is allowed as a substitute for a plea (Rev. Statutes of Illinois, chapter 110, section 28), and the word "plea" in section 7 may mean only a plea at common law. It may, therefore, be that in all cases other than common law the general prohibition applies to corporations. It may be that when a lender to a corpora-

tion enters a court of equity he must do so with clean hands, and the general prohibition may reduce his interest to the general legal rate, notwithstanding sections 7 and 13.

But we have here an *action at law*, and in this action, by the express language of the statute, usury cannot be made a defense unless set up by a plea or a notice in writing (which in Illinois practice is tantamount to a plea), and in case of a corporation no such defense can be made at all, and a recovery can be had.

All we contend for is, that where, under the statute, a creditor (other than a national bank) can *in fact get* interest in excess of the general rate in spite of the *general* prohibition; a national bank is also entitled to recover such excess of interest. The opinion of the Illinois Supreme Court could not, and does not undertake to, repeal sections 7 and 11 of this statute under which such recovery may be had. It does not pretend to reverse its former decisions giving these statutory provisions full effect and permitting the lender to recover by reason thereof the agreed interest from a corporation. All that the court does is to say that in reading the state statute for the purpose of properly construing section 5197 of the Federal statutes, it will look only to the general prohibition and not to sections 7 and 11.

In this it did not give full and proper effect to the words, "interest at the rate allowed by the laws of the state," of section 5197 of the Federal statute.

It is, therefore, insisted that the Supreme Court of Illinois erred in holding, as it did in sustaining the trial court in its rulings upon the foregoing propositions of law, that plaintiff in error was debarred from recovery because the contract was usurious.

II.

THE FEDERAL QUESTION HAVING BEEN ERRONEOUSLY DECIDED BY THE STATE COURT, WHAT SHOULD BE THE JUDGMENT OR ORDER OF THIS COURT?

Section 709 of the United States Revised Statutes, being the section under which this writ of error is prosecuted, provides:

"This court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the case to the court from which it was removed by the writ."

If the Federal question was rightly decided by the state court, it is conceded that under the previous decisions of this court, this court should affirm the judgment. But if the Federal question was wrongly decided by the state court, what is the proper course of proceeding in this court?

In speaking of this, this court, in *Murdock* v. *City of Memphis*, 20 Wallace, 636, said:

"* * * If there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require."

It seems, therefore, that after sustaining plaintiff in error on the Federal question, it rests in the judgment and discretion of this court whether to enter or direct a judgment, or to reverse and remand the case to the state court to pass upon other questions in the case. This seems to depend upon the particular facts of each case. If the

record presents no substantial question other than the Federal one, it would seem that this court should either enter a judgment for plaintiff in error, or remand with directions to enter such judgment.

Such is the present case.

Counsel for defendant in error sought to raise in the state Supreme Court the question whether the note given at the time of the transaction was such a repository of the entire agreement of the parties that evidence of the contemporaneous parol contract to pay the commission or interest sued for was inadmissible to vary, modify or add to the terms of the written contract. But this was simply a question of the admissibility of evidence. Its decision one way or the other cannot affect this case. It does not arise upon this record. All the evidence offered in this case was the stipulation of facts already set out. When offered, defendant in error neither made nor preserved any objection or exception thereto. This question of evidence could only be brought into the case by objection properly *made upon the trial* and exception preserved thereon, as is abundantly established by the authorities.

Daggett v. *Gage*, 41 Ill., 465.
Hills v. *Marlboro*, 40 Vt., 648.

Not only was no such objection made on the hearing, but defendant in error *stipulated the question out of the case* by the agreed statement of facts. The case is thus identical in principle with

Swatara R. R. Co. v. *Brune*, 6 Gill. (Md.), 41.

This being a suit to recover on a written subscription to stock, the defendants offered to read a certain agreement made for the purposes of trial showing an oral agreement that the subscription to stock might be paid in other

stock instead of cash, whereupon the plaintiff objected that this varied the written contract, but the court held the objection not well taken and said:

"The fact, then, to be proved, is admitted. * * * It is a part of the case stated not to be denied that such representation and promise were made, and the court might legitimately infer from the admission that this promise and representation were the only inducements to (the consideration for) the promise by the defendants. *A plaintiff cannot admit a fact and then insist that there must be written proof of it, or it is no fact in the case.*"

So in the present case the defendant in error has stipulated what the real contract between these parties was and has expressly admitted a promise to pay this $3,750, which is sufficient to entitle plaintiff in error to judgment if this court decides in its favor the question of usury. Why should not then the plaintiff in error have judgment in this court or have this court remand the case with directions to enter such judgment? What other question is there to decide?

What course this court would adopt if there were some question in this case other than the Federal question it is not necessary to consider. If this court decides the Federal question in favor of plaintiff in error, it must then look further into the record to determine what order it should enter. Finding there the stipulation of facts stating that under the contract of the parties plaintiff in error is entitled to $3,750, and finding that the question of evidence suggested by counsel is really not in the case, but has been taken out of it by the stipulation of the parties, it would seem that plaintiff in error should be entitled to a judgment in this court or a reversal with directions to enter judgment in its favor for $3,750.

All of which is respectfully submitted.

HENRY S. ROBBINS,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
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MAR 18 1896
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 254.

THE UNION NATIONAL BANK,
Plaintiff in Error,
vs.
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Defendant in Error.

Error to the Supreme Court of the State of Illinois.

REPLY ARGUMENT FOR DEFENDANT IN ERROR.

G. W. KRETZINGER,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINTERS.

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Defendant moved to dismiss this case for want of jurisdiction, and filed points and authorities in support thereof. Counsel for plaintiff filed his suggestions and authorities against this motion, and also filed his brief upon the whole case, to which we reply, without waiving in any degree our motion to dismiss.

Defendant contends that it has two distinct and separate defenses: One arising under the Illinois statutes, which was sustained by the Illinois Supreme court, and the other under the National Banking Act; and that this second defense was not necessary or essential to the consideration and maintenance of the first.

This is an action in assumpsit brought by plaintiff in error—a national bank. The declaration is in the common counts for money had and received, interest, etc. Defendant in error is a railroad corporation. To this declaration it filed its plea of general issue, with two special pleas.

The special pleas charge usury under the National Banking Act. No special plea of usury under the state law was interposed, but defendant relied upon the prohibitions contained therein.

The transaction here involved appears in the stipulation of facts. (See transcript 15.) From this stipulation it appears.

First. On September 17, 1890, under *verbal* arrangement plaintiff agreed to loan defendant $150,000, to be secured by a deposit of $300,000 of defendant's mortgage bonds; this loan to be evidenced by a note executed by defendant for that sum, note to draw interest *after* maturity at the rate of eight per cent. per annum. No rate of interest from date to maturity was fixed or recited in the note.

Second. It was *verbally* agreed between plaintiff and defendant that six per cent. was to be deducted from the face of the note from the date of its delivery to its maturity; that defendant "should endeavor to secure the Chicago and Western Indiana Railroad Company as a depositor for plaintiff"; that in case "of failure so to do," "the said bank should have, in lieu of said deposit, a commission of two and one-half per cent. upon said $150,000 in addition to said six per cent. thereon," etc.

Third. That this verbal arrangement was made by

plaintiff with the president of defendant, and the day after the treasurer of defendant made and executed defendant's note for $150,000, dated September 17, 1890, payable six months after date, to plaintiff's order, describing the bonds as collateral security, and providing that "after maturity the note was to draw interest at the rate of eight per cent. per annum." (See transcript, 16.)

Upon delivery of this note to plaintiff, it discounted—deducted from the face of the note interest for the six months at the rate of six per cent., being from the date of the note to the date of its maturity, and the balance was placed to the credit of the defendant.

There was no *written agreement* fixing the rate at eight and one-half per cent., and *no written agreement* for payment of six per cent. thereon by discount, or otherwise. Upon the maturity of the note the loan was extended for thirty days, and a further note, with like conditions as the first, was made and delivered to the plaintiff. (See copy of second note, transcript 17.)

Upon the delivery of the second note the first note was cancelled by plaintiff by endorsing thereon the word "paid," and the same was returned to the defendant. The second note was paid by defendant upon its maturity, and was marked by plaintiff as cancelled and paid, and was returned with the collateral security to defendant.

Counsel for plaintiff contends, first, that inasmuch as the Illinois statute prohibited a corporation from pleading usury, no rate is fixed by such statute as to corporations: That this is true, notwithstanding the Illinois statutes limit the rate, where the rate is not agreed to in writing, to six per cent., and limit a written agreed rate

to eight per cent., and expressly prohibit and make unlawful a rate on verbal contracts in excess of six per cent., and written agreed rates in excess of eight per cent, --

2d: That under the National Banking Act, where no rate is fixed by state law, plaintiff as a national bank is entitled to charge and receive interest at the rate of eight and a half per cent.

This cause was tried in the State court and the judgment of the trial court was affirmed by the Supreme court, the opinion of which is attached to the transcript.

ARGUMENT.

I.

AS TO THE PROVISIONS OF THE ILLINOIS STATUTES FIXING INTEREST RATES.

Section 1 of the law of this state, in force at the date of this transaction fixed the *legal* rate of interest at six per cent.

SEC. 2 provides: "Creditors shall be allowed to receive at the rate of six per cent. per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

"SEC. 4. In all written contracts it shall be lawful for the parties to stipulate or agree that eight per cent. per annum, or any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation to any person or corporation in this State, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided."

"SEC. 5. No person or corporation shall directly or indirectly accept or receive in money, goods, discounts or thing in action, or in any other way, any greater sum or greater value for the loan, forbearance or discount of any money, goods, or things in action, than as above described."

It is manifest:

1st. That the statutory rate of six per cent. applies to all verbal agreements and to all written agreements in which the rate is not specified.

2d. That a higher rate than the statutory rate of six per cent. upon verbal agreements, and where a higher rate is not agreed to by the parties in writing, and a higher agreed rate in writing than eight per cent., are made unlawful, and by Section 5 every person and every corporation are *expressly* prohibited from "*directly* or *indirectly*" accepting or receiving a higher rate "than as above described and fixed by Sections 1, 2 and 4."

In addition to these express *prohibitions*, which make all verbal and written agreements in violation thereof *unlawful*, Section 6 provides a forfeiture of the entire interest as a penalty or punishment to the usurer, and permits only the recovery of the principal.

It is the settled law of this state that to secure the forfeiture of the entire interest the defence provided in Section 6 must be specially pleaded, and that if it is not so pleaded the defendant waives the forfeiture of the entire interest, but such waiver does not include the prohibition contained in Sections 4 and 5; that is, where usury is specially pleaded, the court will hold the agreement fixing the usurious rate is not only void, but that the plaintiff shall *not* be entitled to recover *even* the statutory rate of six per cent., which applies in the absence of a written agreement fixing the rate, but he shall forfeit interest at the statutory rate, as well as interest at the agreed usurious rate. Illinois courts further hold that if the plea of usury is not interposed, the contract for the usurious rate is still *unlawful* and *void*, which leaves the parties *without* any agreed rate, and, therefore, the statutory rate of six per cent. will apply.

The natural person, therefore, *who fails to plead usury* is in *no* different position than a corporation, which is *not* permitted to plead usury.

Again there is a marked difference between a defense

arising under the prohibitions and limitations contained in sections one, two, four and five, and the difence of forfeiture under Section 6, from which it conclusively follows that section 11 which withholds from a corporation the right to plead usury, to secure the penalty and forfeiture contained in Section 6, does *not* include and does *not* prohibit such corporation from relying upon the prohibitions contained in sections two, four and five for defense. These distinctions were clearly made, and this construction was given to these sections by the Supreme court in its decision of this case, upon the defence arising under these sections.

Mr. Justice BAILEY in delivering the opinion of the court quotes Sections 2, 3, 4, 5, 6 and 11 above cited, and of them says:—

"It will be observed that by Section 2 of our statute, creditors are allowed to receive interest at the rate of six per cent. per annum on money lent to the use of another, and by Section 4 it is made lawful in all written contracts to agree that interest at the rate of eight per cent. per annum shall be taken and paid. By Section 5 all persons and corporations are prohibited from accepting or receiving, either directly or indirectly, any greater rate for the loan forbearance, or discount of money than is precribed in the preceding sections."

It is thus manifest that Section 11, which withholds the right from corporations to plead usury, is limited in its application to Section 6, and does *not* extend to Section 5, or exclude the prohibition therein contained.

Mr. Justice BAILEY continues: "The rate of interest is thus expressly limited to six per cent. per annum in all cases where the agreement in respect to interest is not in writing, and where the contract is in writing, eight per cent. is allowed to be stipulated for, and no more, and the reservation of any greater rate of interest than is thus limited by any person or corporation is made unlawful by express statutory prohibition.

But it is urged that the effect of Section 11, which prohibits corporations from interposing the defense of usury, is to create an exception in cases where corporations are debtors, so as to take all cases of that character out of the operation of the statute. The theory seems to be that because a corporation cannot set up usury as a defence any person or corporation dealing with a corporation may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that where a corporation is debtor no rate of interest is fixed by the laws of this state. To this view we are totally unable to yield our consent.

The defense of usury is made by setting up and seeking to enforce the forfeiture or penalty imposed by Section 6 of the statute; that, doubtless, a corporation cannot do. But the force and efficacy of the statute, or the binding nature of its prohibitions, does not depend upon the penalty which it imposes for disobedience to those provisions."

THAT IS, *this fatal prohibition would still remain if sections 6 and 11 were eliminated from the statute.*

So Judge BAILEY held, with judicial emphasis, that "whatever a statute *forbids* becomes *unlawful*, whether a penalty is annexed as a consequence of disobedience or not. While corporations cannot enforce the forfeiture imposed by our usury laws, it does *not* follow that the statutory prohibition against exacting or paying more than the lawful rates of interest has no application to them. The prohibition is general and applies by its terms to every person or corporation, and no contract, whoever may be the parties to it, can be so framed as to provide for the reservation of more than the rates of interest allowed by the statute *without* being in contravention of the statute and therefore unlawful.

Nor does it follow that because the debtor who has agreed to pay more than the legal rate of interest is a corporation, and therefore uncapable of interposing the defence of usury, the law will treat the contract as valid and enforce it according to its terms. No agreement between parties to do a thing prohibited by law or subversive of any public interest which the law cherishes, will

be judicially enforced. The general rule, therefore, is that any act which is forbidden, either by the common or statutory law, whether it is *malum in se* or merely *malum prohibitum*, whether indictable or only subject to a penalty or forfeiture, or however otherwise indictable or only subject to a penalty or forfeiture, or however otherwise prohibited by statute or the common law, cannot be the foundation of a valid contract. Bishop on Cont., Sec. 470, 471, and authorities cited in notes. 'If the subject-matter of an agreement be such that a performance of it would either consist in doing a forbidden act or be so connected therewith as to be in substance part of the same transaction, the law cannot command the parties to perform such an agreement' * * * 'Where an act is expressly prohibited by statute a contract to perform or in furtherance of the prohibited act is *illegal* and *uninforcible*.' Lawson on Cont., Sec. 279; see also cases cited in note 1. * * * Our statute in relation to interest contains both prohibition and a penalty. Where the party agreeing to pay illegal interest is a corporation the penalty cannot be invoked in its favor, but the prohibition remains wholly unaffected by the provisions of Section II, which takes from corporations the right to interpose the defense of usury. *Farwell* v. *Meyer*, 35 Ill., 40, was a bill in chancery to set aside a judgment by confession upon a judgment note in which more than the maximum rate of interest then allowed by law was reserved. As a court of equity will not enforce a penalty, no attempt was made to set up or take advantage of the forfeiture then imposed by the statute for exacting illegal interest. The contract, therefore, was treated precisely as though no penalty of forfeiture were imposed. The court however held that the agreement as to interest, being in contravention of the statutory prohibition, was void and incapable of enforcement and that only the rate of interest given by law in the absence of a contract was collectible. On this point, it was said: 'The legal rate of interest in this state is six per cent., and although parties are allowed to stipulate for a rate of interest not exceeding ten per cent., the privilege thus given must be exercised in conformity to the statute. An agreement which cannot be enforced as it was made will not be enforced

at all. Where the parties stipulate for a higher rate of interest than ten per cent., the agreement cannot be enforced as it was made and we cannot substitute for it an agreement which the parties did not make. In such cases the part of the agreement stipulating for a higher rate of interest than six per cent., will *not* be enforced and the lender or other person contracting for an illegal rate of interest will be allowed (where no forfeiture or penalties are insisted upon) *only* to recover six per cent. as the measure of the value which our law has established for the use of money where no agreement has been made for a higher rate in conformity with its provisions.' "

That is, the prohibited agreement being unlawful, the case was treated as though no agreement fixing the rate had been made, and thus the statutory rate of six per cent. applied with the same force and effect as if the parties had never attempted to fix the rate by agreement:

" In the present case then the section of the statute imposing a penalty may be left out of view as inapplicable, but still the prohibitory part of the statute remains, making it unlawful for any person or corporation to directly or indirectly accept or receive for the loan or forbearance of money any greater rate than six per cent. by oral agreement, or greater than eight per cent. where the contract is in writing."

We have quoted so much of this opinion because the construction it gives to these sections of the Illinois statute is so clear and unanswerable, and for the further reason that it furnishes an ample defense for defendant against plaintiff's claim for this additional two and one-half per cent. *without* any reference whatever to the National Banking laws.

In *County Bank* v. *Lamb et al.*, 26 Barbour, 600, the plaintiff was a state bank. Held:

" But the statute expressly declares that upon such a note 'the corporation shall not take or receive more than

at and after, the rate of six per cent. per annum in advance.' This language is unequivocal and imperative. It forbids in plain words the act of taking or receiving beyond the specified rate, and by force of the terms it prohibits the making of the contract by or upon which a greater amount is taken. * * * The long established maxim of the law, '*ex turpi causa non curitur actio*,' is equally applicable where the act or contract is prohibited by statute, either expressly or by implication, as when it is *contra bonos mores*. 'It is quite clear,' says Lord Eldon in *ex parte*, Dysler (2 Rose, 351), 'that a court of justice can give no assistance to the enforcement of contracts, which the law of the land has interdicted;' and in *Aubert* v. *Maze* (2 B. & P., 374), it is expressly affirmed that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum*. In *Watts* v. *Brooks* (3 Ves. Jr., 612), the court says: 'There is nothing unusual in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The court will not execute the contracts.' * * * Our own courts have not hesitated to apply the maxim in its true spirit whenever the occasion has demanded. *Leavitt* v. *Palmer* (3 Const., 19), and *Talmage* v. *Pell* (3 Seld., 328), are strong cases to establish the individally of contracts made in violation of the express or implied prohibition of statutes. * * * But to enumerate here the various cases in which 'this principle has been practically applied, would be to incur the imputation of vain parade.' Enough has been said to show that where the contract sought to be enforced springs out of a violation of the statute of the state, the court 'will leave the parties to the illegal transaction where it finds them, withholding from both its aid in enforcing it.' (See Justice Sill, in *Tylee* v. *Yates*, 3 Barb., 228.) 'It is upon that ground the court goes, not for the sake of the defendant,' says Lord Mansfield, 'but because they will not lend their aid to such a plaintiff.' * * * The rate of seven per cent. was knowingly taken, and this operates as a violation of the statute, whether the officers of the bank knew of its existence and intended to

disregard it or not. * * * 'It is sufficient,' says Lord Stowell, 'if there is a contravention of the law, if there is a *fraus in legem;* whether that may have arisen from mistaken apprehension, from carelessness, or from and other cause, it is not material to inquire.' "

Counsel does not *deny* or *seek* to avoid the force and effect of Sections 1, 2, 4 and 5 of the statute of our state, which without ambiguity or equivocation, limits the rate of interest on verbal contracts to six per cent. and in written contracts to eight per cent. per annum.' He does not deny that any excess of this fixed rate is "*malum prohibitum*," but asserts that Section 11, which refuses corporations the right to plead the penalty and forfeiture provided under Section 6 not only relieves plaintiff from the fixed rate and prohibition contained in Sections 1, 2, 4 and 5, but also relieves plaintiff from the forfeitures and penalties of the National banking act. Nay, more, that Section 11 constitutes in and of itself statutory authority to national banks and to corporations in this state to lawfully and by legislative authority contract for any rate of interest in disregard of the "*malum prohibitum*," and therefore any rate exceeding the lawful rate fixed by Sections 1 and 4 is made legal.

To entitle plaintiff to recover it must prove that the rate of eight and a half per cent. is allowed by law to natural persons or corporations, including state banks in this state, and it offers for such proof Section 11 which fixes no rate of interest whatever, but simply withholds from corporations the right to plead the penalty and forfeiture provided in Section 6.

We contend that the provisions of our statute to the effect that all contracts, whether the borrowers are natural persons or corporations, in which a rate is named in

excess of the statutory rate limited by Sections one, two and four, are illegal; that Section 11 does not make such contract legal as to a corporation or enforceable in law against such corporation at the illegal rate agreed upon, but in such cases the contract being illegal it will be wholly disregarded by the court and will not be enforced, and plaintiff will be entitled to recover against such defendant corporation *only* the legal rate fixed in sections two and four, namely, six per cent., the same as if no contract rate had been made or attempted; that in all cases in which the rate fixed in a written contract pleaded or offered in evidence between natural persons, exceeds the statutory rate, and the defendant fails to plead usury, the Illinois courts refuse to enforce the penalty and forfeiture provided in Section 6—wholly disregard the contract rate, and remit plaintiff to the legal rates fixed in Sections 1, 2 and 4, which defendant is required to pay, as though no contract had been made, is fully sustained in *Farwell* v. *Meyer*, 35 Ill., 52, and in the opinion of the Supreme court attached to the transcript in this case.

II.

PROHIBITIONS AND PENALTIES OF THE NATIONAL BANKING ACT BRIEFLY CONSIDERED.

Section 5197 of the revised statutes (Sec. 30 of the National Banking Act), provides:

"Any association may take, receive, reserve and charge * * * interest at the rate allowed by the laws of the state, etc., where the bank is located and no more, except that where by the laws of any state a different rate is limited for banks of issue, etc. When no rate is fixed by the laws of the state, or territory or district, the bank

may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run."

Sec. 5198 provides that taking a higher rate "than is allowed by the preceding section, when knowingly done shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

These sections provide for two distinct restrictions:

First. Where the rate is fixed by the state, the bank is expressly limited to such rate.

Second. When no rate is fixed by the state, the bank is limited to a rate not exceeding seven per cent., which is fixed by the national banking act.

Duncan v. *National Bank*, Thompson's National Bank Cases, 360.

In effect counsel contends:

(*a.*) That section 11 of our statute, which withholds the right from a corporation to interpose the defense of usury relieves corporations, including national banks in this state from the rates fixed in sections 1, 2 and 4, and from the prohibition contained in section 5.

(*b.*) That section 11 as to corporations changes the limitations and prohibitions contained in sections 1, 2, 4 and 5 of our statute, into an express and affirmative permission to corporations in this state to contract verbally or in writing for any rate of interest they see fit.

(*c.*) That by virtue of section 11, which prohibits a corporation from interposing the defense of usury, the unlawful rate expressly prohibited in section 5 may become the subject of a lawful contract, and that the effect of sections 6 and 11 construed together constitute an express and affirmative legislative declaration equivalent to the statutes of Texas and California, which expressly provide that parties were authorized "to contract for any rate of interest upon which they might agree." *National Bank* v. *Bruhn*, 64 Texas, 571, and *Hinds* v. *Marmolejo*, 60 Cal., 229, cited by counsel for appellant.

The effect of this novel rule of statutory interpretation and construction is that section 11 withholding from a corporation the right to plead the forfeiture contained in section 6 repeals sections 2, 4 and 5 as to corporations, and converts these three sections into an affirmative permission to corporations to violate and disregard the prohibitions contained therein, and leaves corporations without any statutory rate.

In *Duncan* v. *National Bank*, *supra*, the court held that Congress dealt with general rules, "and when it refers to banks of issue under state laws it means the *general* law applicable to the whole state and relating the banks of issue all over the state;" that is, to "the general law" affirmatively fixing the rate of interest said banks or natural persons may charge; NOT rates of interest against which they are *not* permitted to defend upon the ground of usury as for *penalty* and *forfeiture* of the entire interest.

Tiffany v. *National Bank*, cited by counsel, does not sustain his views of the force and effect to be given to section 11, and is not in conflict with the position here asserted or taken by the Supreme court in the opinion on which error is here assigned.

The pivotal point decided by this court in *that* case is expressed in these words:

"It (the national banking law) allows such banks (national) to charge such interest as state banks may" (lawfully) "charge, and more, if by the laws of the state, more may be" (lawfully) "charged by natural persons."

The rate a state bank may charge is not determined by a law which withholds from it the right to insist upon the forfeiture of the entire interest by reason of an unauthorized and unlawful rate. OTHERWISE STATE BANKS MAY

CHARGE TWO RATES; ONE fixed and lawful to natural persons, and ONE *un*fixed and *un*lawful as to corporations.

The national banking act adopts the former *because* it is fixed, allowed and made lawful by state law, and counsel contends in effect that the national banking act must be held to adopt the latter excessive and illegal rate because it is purged of its illegality by section 11 withholding the penalty and forfeiture for its breach, although the making and enforcement of such rate are prohibited. If this view of counsel is correct then *state* banks as to *defenseless* corporations are limited only by *un*limited rates, and therefore *national* banks are equally authorized by the national banking law to violate sections 1 and 4 of our statute because otherwise *state* banks would gain an advantage in their violation of these two sections, if national banks were not also permitted by national law to violate and disregard them.

Counsel's contention may be stated thus:

A statutory prohibition *minus* the right to claim a forfeiture for its violation *equals* affirmative statutory authority to violate it; or, a provision of the statute *withholding* one defense against the breach of another express affirmative provision of law *not* only justifies the breach, *but* is, in fact and full effect, an express statute providing for and authorizing it.

This interpretation and construction of sections 6 and 11, whether taken together or separately, cannot be sustained upon principle or authority. I contend that sections 1 and 4 *alone*, without the aid of any other sections in our statute, regulating interest, fixes the rate that persons or corporations may charge under these sections, and furnish the only statutory evidence of such rates required

by the national banking law. The national banking law furnishes its own penalties and forfeitures for the violation of its provisions. Is section 11, which merely prohibits defenses upon the ground of usury, an express legislative authority under *either* the Illinois statute *or* the National Banking act to charge a rate of interest in excess of the legal rate fixed and allowed by sections 1 and 4?

In *National Bank* v. *Childs*, 130 Mass., 519, held:

"The rate of interest which a national bank in any state may take is determined and fixed by the statutes of the United States, although it is measured in such state by reference to the local law concerning interest, if there be one."

So, sections 1 and 4 of our statute, and not sections 6 and 11, furnish the evidence of the violation of the first prohibition contained in section 30 of the national banking act. Section 4 limits the agreed rate to eight per cent. per annum. Section 6 provides the penalty for a violation of section 4, and section 11 excludes corporations from the benefit of this penalty—*not* from the prohibition, *but* section 11 cannot exempt national banks from the penalty imposed by section 30 of the national banking act. So the Massachusetts court held in the case last cited, and to the same effect see *Farmers' and Merchants' Nat. Bank* v. *Deering*, 91 U. S., 29.

Therefore, Section 4 of our statute, fixing the rate, constitutes the measure under which the right of plaintiff to charge interest in this state must be determined under and by virtue of section 30 of the national banking act, and sections 6 and 11 have no rightful place in this argument, because the defense here interposed under the two special pleas "is expressly provided by national law under which the bank exists."

The legislature of this state cannot prohibit a corporation from pleading a violation of an act of Congress; penalties furnished in the national banking act cannot be relieved by state legislation.

In *National Bank* v. *Eyre*, 52 Iowa, 115, held:

"Now, in an action which is brought to enforce a claim which is not valid, it would be strange if in the same action the defendant could not be allowed to resist the claim." Citing:

Hade v. *McVay, Allen & Co.*, 31 Ohio, 231.

Ordway v. *Central Nat. Bank*, 47 Md., 217.

Betz v. *Columbia Nat. Bank*, 87 Penn. St., p. —.

Plaintiff seeks in this suit to recover interest on a verbal agreement which is prohibited by the Illlinois statute and declared void by the Supreme court of this state, as well as by the act of Congress, and as stated in *National Bank* v. *Eyre*, *supra*, "*it will be strange*" indeed if this defense under both of these laws could be defeated by section 11 of the Illinois statute.

National Bank v. *Hoagland*, 7 Federal Rep., 159.

THE RATE PLAINTIFF ALLEGES DEFENDANT VERBALLY AGREED TO PAY WAS EIGHT AND A HALF PER CENT., ONE-HALF PER CENT. IN EXCESS OF THE HIGHEST RATE PERMITTED BY SECTION 4 OF OUR STATUTE.

Thus plaintiff not only violated the first restriction of section 30 of the National Banking act, but also violated section 4 of our statute.

As shown, the lender cannot recover the illegal contract rate, because the borrower—a corporation—cannot plead the forfeiture of the entire interest, and in such case a contract as to interest would be wholly disregarded, and plaintiff will be limited in his recovery to the legal rate of six per cent., even though the defense of usury—penalties and forfeitures—is *not* allowed to corporations, and is *not* interposed by a natural person.

Farwell v. *Meyer*, *supra*.

If plaintiff exceeded the interest allowed by the law of this state, which it did by two and one-half per cent., under the second section and one-half per cent. under section 4, if the agreement had been reduced to writing, then it violated the first provision of section 30 of the banking act and the inevitable penalty, *namely*, forfeiture of interest, follows, without reference to section 11 of our statute.

Section 5 of our statute prohibits every direct or indirect method that may be devised to violate section 4, whether by way of discount, receipt of excess, choses in action, or in any other manner.

In *Leonard* v. *Patton*, 106 Ill., the court held (p. 104):

"The statute cannot be avoided by any shift or device which may be resorted to by the parties. The form of the transaction is not material, but whenever it clearly appears that more than the legal rate of interest has been exacted, the contract will be held to be usurious."

The national banking act expressly withholds from plaintiff the power to charge or receive interest at this rate, namely, in excess of the amount *fixed* by the state law.

Danforth v. *National Bank*, 48 Fed. Rep., 271.

Bank v. *Johnson*, 104 U. S., 371.

The construction of the law in these two cases disposes of the principal, if not the *sole* ground upon which counsel for plaintiff urges the right to recover. The gist of his contention is that Congress intended that national banks should have all the benefits and privileges in the matter of charging and receiving interest and discounts, in any of the states and territories conferred upon natural persons or state banks, and in support of that contention cited several state decisions, notably the Texas case.

In *Danforth* v. *National Bank*, *supra*, the court held just the contrary, and moreover construed the decision of this court in *Bank* v. *Johnson*, *supra*, holding with emphasis that that which was *not* lawful as to natural persons or corporations in New York, under the laws of New York, was *un*lawful as to national banks under and by force of the prohibitions contained in the national banking act.

The Illinois Supreme court in *Farwell* v. *Meyer*, *supra*, and in this case, held:

That the law which prohibits charging or receiving a higher rate than six per cent. in one class of cases and eight per cent. in the other, which rendered an agreement to the contrary void, applied with equal force to natural persons and corporations.

In *First Nat. Bank of Uniontown* v. *Stauffer*, 1 Fed. Rep., 187, the court gave the same construction to the provision of the national banking act for which we here contend, and also approved *Danforth* v. *Bank*, *supra*, as to the effect of the decision of this court in *Bank* v. *Johnson*, *supra*, and held.

"It is thus declared that the effect of a mere stipulation for illegal interest by a national bank is to deprive it of the right to recover more than 'the sum lent, without interest.'"

In this case the principal with six per cent. interest thereon has been paid. If this suit involved six per cent., as well as two and one-half per cent., the defense would extend under the national banking act to the entire sum of eight and one-half per cent. The rule is uniform that if the banking corporation has no authority to make a contract, it is void, and cannot be enforced. *Central R. R. and Banking Co.*, v. *Smith*, 76 Ala., 572. But the principle is elementary, and needs the citation of no authorities in its support.

Crooker v. *Bank*, Thompson National Banking Cases, 317.

Bank v. *Childs*, *supra*.

This case is decisive of the point for which we contend, namely, that eight and one-half per cent. is an illegal rate in this state, therefore expressly prohibited by the national banking act, and this prohibition constitutes a full and perfect defense against this suit for the two and one-half per cent. of the eight and one-half per cent. which counsel claims plaintiff is entitled to receive.

If section 11 of our statute sets free and put at large the six per cent. rate fixed by sections 1, and 2, and the eight per cent. rate fixed by section 4, as to corporations, so that as to corporations there is no rate in this state, *then the seven per cent. rate in the national banking act applies.*

Bank v. *Johnson*, *supra*.

Counsel contend that it was the purpose of Congress to give national banks as financial agents of the government the benefit of the highest state rate—to place them upon an equal ground with natural persons and state banks. *Farwell* v. *Meyers*, *supra*, was between natural persons.

The rule there adopted was applied to a state corporation as a defendant in this case, the Illinois Supreme court holding that a natural person who failed to plead usury occupied the position of a corporation under section 11, and that while it was not entitled to insist upon a forfeiture of the entire interest under section 6, it was entitled under sections 1, 2, 4 and 5 to have the contract for the excessive rate held void, and to limit the party claiming interest to the statutory rate as though no agreement had ever been made.

THE NATIONAL BANKING ACT EXPRESSLY WITHHOLDS FROM NATIONAL BANKS AND BY EXPRESS WORDS PROHIBITS THEM FROM CHARGING OR RECEIVING INTEREST EXCEEDING THE RATE FIXED BY STATE LAW.

Any contract therefore made by the bank, wherein a higher rate is charged is *ultra vires* and wholly void for want of corporate power to make it.

In Bank of *Wooster* v. *Stephens, et al.*, 1 Ohio St., 233, the contract rate exceeded the rate fixed by the charter. Mr. Justice Ranney, delivering the opinion of the court, said:

"And it is equally true, that if the obligation upon which this judgment is founded was tainted with usury, it was absolutely void for want of corporate power in the plaintiff to make it."

8 Ohio R., 257, 11 *ib.*, 489, 107, and cases above cited.

The exercise of any power by a corporation which it is expressly prohibited from exercising by the law under which it was organized and exists, irrespective of its subject-matter, is utterly void. The interposition of the de-

fense of usury, or any other special defense, is not required. *Its nullity is inherent.*

Under point 2, counsel insists that the stipulation admitted the truth of the facts recited therein, which became the evidence in the case, without objection, and therefore he argues that thereby defendant admitted the rule of law he contends is applicable to these facts. This we deny. The stipulation recites the verbal agreement as the same was understood to have been made by both parties thereto. Had defendant sued under the national banking act to recover the penalties and forfeitures therein provided, it would have recited in its declaration this verbal agreement—the fact of it having been entered into, the same as it now appears in this stipulation. And if counsel is correct in his view, such a recital in a declaration would have defeated the suit. The simple admission that an agreement was made, does not carry with it an admission of its validity.

The alternative verbal agreement recited in the stipulation, namely, that defendant should secure plaintiff the deposit account of the Western Indiana, or should pay an additional two and one half per cent. as compensation for the loan, was fully considered by the Illinois Supreme Court in its decision of this case. (See its opinion, transcript, 35.)

Observe that the stipulation describes the additional two and one half per cent. as "a commission of two and one half per cent. upon said one hundred and fifty thousand dollars, in addition to said six per cent. thereon." (Trans., 15.)

That the lender cannot charge a commission for lending his own money, if such commission added to the rate of interest charged exceed the rate of interest fixed by the statute, see:

Sanford v. *Kane*, 133 Ill., 199, and cases cited.

Anderson v. *Ryan*, 111 Ill., 506.
Meers v. *Stevens et al.*, 106 Ill., 549.

Whether the two and a half per cent. were paid in the deposit account or in money, the payment was to be in satisfaction for one and the same thing, for interest for the loan and its forbearance.

This the Illinois Supreme Court held constituted a void agreement, by virtue of the express prohibitions contained in Sections 2, 4 and 5 of the Illinois statutes, without reference to section 11.

IF THE RATE FIXED IN ONE SECTION OF OUR STATUTE IS SET FREE AND UNFIXED BY ANOTHER SECTION IN THE SAME ACT, THE LATTER SECTION IN EFFECT REPEALS THE FORMER, AND IT CANNOT BE CONTENDED THAT THERE IS ANY STATUTORY RATE FIXED OR ALLOWED AS TO CORPORATIONS, THEREFORE THE RATE OF 7 PER CENT. PROVIDED IN THE NATIONAL BANKING ACT FOR SUCH CASES WOULD APPLY.

In *Rosa* v. *Butterfield, et al.*, 33 N. Y., 665, the court quotes from the New York laws, section 1 :

"No corporation shall hereafter interpose the defense of usury in any action. (Sess. Laws, 1850, Ch. 172, p. 334.)"

The court then refers to the effect of the usury law, and defines the quality of the act it prohibits, and referring again to the exclusion of corporations from the statutory defense of usury, says :

"If the law which creates the taint (usury) declares that it shall not be allowed to exist as to a certain class of contracts, or be asserted by a certain class of persons to annul their contracts, is not this quite *equivalent to*

saying that those contracts are free from the taint and outside of its consequences? Properly collated, the statute becomes in substance, that no person shall take usury, and all contracts which take or secure it shall be void; but no corporation shall ever allege usury to defeat its contracts. *This it seems to me would be equivalent to declaring that the contracts of corporations shall* NOT *be subject to the provisions of this statute.*"

The court then cites and approves *Butterworth, Receiver*, v. *O'Brien*, 28 Barbour, 187, affirmed in 23 N. Y., 275.

The same principle and statutory construction are asserted and adopted in *In re* Albert Wild, 11 Blatchfore, 243, in which Judge WOODRUFF, sitting as circuit judge, held :

"On the other hand, it was entirely competent for Congress when providing for the organization of national banks to place them under such restrictions, in respect to the rate of interest which they might charge or receive, as Congress might see fit. As creatures of their own creation, they could be subjected to such inhibitions as were deemed expedient, *even though the privileges were far short of those enjoyed by state banks, or by individual within the several states.* * * * Hence, had Congress seen fit to say that no national bank should contract for, reserve or receive more than at the rate of five per cent. per annum for a loan of money or for or upon the discounting of a note, bill, or other security, it would have been a perfectly valid limitation of their powers.

"It would be in no conflict with any law of a state which permitted the making of loans in general at a higher rate of interest, and, if Congress could do this, Congress could also declare the forfeiture or penalty incurred by the national bank for violating the prohibition. Such bank would still be left subject to the operation of the state law, imposing, it might be, a different penalty for the violation of its own state laws, as was held by the New York Court of Appeals in the case above referred to ; it follows, that transactions may not be condenmed by

the state laws, applied to individuals or to corporations in general, and may, under such state laws, *be legal and valid, which, nevertheless, national banks may not make, and for which, if made, they may be liable to penalties or forfeitures prescribed by the law of their being.*"

At this point observe the express words in which the first restriction of rates in section 30 of the National Banking act is expressed, *namely*, every association may take, receive, reserve and charge, on any loan, etc , interest at the rate *allowed by the laws of the state or territory where the bank is located*, AND NO MORE, except that where by the laws of any state a different rate is limited for banks of issue, etc. The words, "*at the rate allowed by* "*the state or territory*," etc., *cannot be construed to mean and include the words*, "OR a rate agreed upon be- "tween the parties." The words, "*at the rate allowed* "*by the state or territory*," etc., *exclude all rates* depending upon a contract of parties based upon their voluntary and unlimited right to fix the rate. Congress, in this provision, intended to adopt, as a measure of rates for this restriction, *statutory rates and no other.*

The second restriction provides, "when *no rate is fixed* "*by the laws of the state or territory*," the bank may "take," etc., "a *rate not exceeding seven per centum.*',

The words "*if no rate is fixed by the laws of the state* "*or territory*" CANNOT BE CONSTRUED TO MEAN AND INCLUDE THE WORDS, "*if no rate is fixed by voluntary* "*agreement of the parties.*" The words "if no rate is "fixed by the laws of the state or territory" EXCLUDE *all other rates fixed in any other manner by any other authority.*

In *Summis* v. *Clark*, 13 Ill., 544, held:

"It is a rule, in the construction of statutes, that the *expression* of one thing is the exclusion of another," etc.

Dwarris on Statutes, 713.

The King v. *Cunningham*, 5 East., 478.

The Warden of St. Paul v. *The Dean*, 4 Price, 78.

Therefore, "*if no rate is fixed by the law*" *of the state as to corporations*, AND IF CORPORATIONS MAY AGREE AND FIX SUCH RATE, AS THEY MAY CHOOSE BY CONTRACT, as though sections 1, 2, 4 and 5 of our statute had never been enacted, *then as to such corporations* "*no rate is fixed by the laws*" *of this state*, and national banks in this state, dealing with corporations, *are limited to the rate fixed* in this second restriction, to wit, "a rate not exceeding seven per centum."

Judge WOODRUFF further held, *in re* Alfred Wild, *supra*: "The State of New York has statutes which prohibit the taking, receiving, or reserving of interest for the loan or forbearance of money, etc., at a greater rate than seven per cent. per annum; and making any note, or bill, or other contract, whereon or whereby any greater rate is reserved, void. But the state has a further statute, (Laws of 1850, Chap. 172, page 334) *which enacts that no corporation shall interpose the defense of usury in any action.*

"Such was the state of the law in New York when the National Banking Act was passed. The force and effect of this last named statute has been declared by the courts of the State of New York in numerous cases. Those cases are collected, carried to what is deemed their legitimate conclusion, by the Court of Appeals, and distinctly affirmed, in *Rosa* v. *Butterfield*, 33 N. Y., 665. The doctrine of that case is, *that the dealings of a corporation, as a borrower, and its contracts or obligations for loans, are unaffected by any laws of the State of New York regulating interest;* THAT AS TO THEM, *such laws theretofore existing* ARE REPEALED; *that, therefore the rate of interest which corporations may agree to pay is not fixed or limited, but they may agree to pay any rate they see fit, and their contract will be valid.* * * * In short, that as to contracts made by corporations whether foreign

or domestic whether made in the State of New York or elsewhere, they stand in the State of New York as if no usury laws existed. (See also, *Belmont Bank* v. *Hoge*, 35 N. Y., 65.) In respect to contracts made within the State of New York, or entered into under or with reference to the laws of the state, I may accept the exposition thus given of the state of the law of New York, and it follows *that there is no law in New York fixing the rate of interest which any one may take upon the loan of money to a corporation*, or, in other words, *any rate of interest is allowed to which the parties may agree.*"

And so counsel for plaintiff contends that the lender may agree for any rate of interest with a corporation, *because* corporations in this state cannot interpose the defense of usury.

The court continues:

"*As to dealing with corporations, national banks, in the State of New York, are, therefore, within the case described in the National Banking laws above cited, to wit*, 'WHEN NO RATE IS FIXED BY THE LAWS OF THE STATE OR TERRITORY, *the bank may take*, receive, reserve or charge *a rate not exceeding seven per centum*,' etc. This is a necessary and logical result. If the rate were fixed by the laws of New York, then her usury laws would apply. *If the limitations in her statute relating to interest do not apply, then no rate is fixed by her laws.*"

Counsel agrees with these judicial views, but, in addition thereto, insists that inasmuch as corporations cannot defend against usury, they not only have the right to fix by voluntary contract a rate exceeding the rate fixed and allowed in sections 1, 2, 4 and 5 of our statute, but that when such excessive rate is so fixed by voluntary agreement, it becomes the statutory rate, *although it exeeeds and violates the statutory rate.*

Judge Woodruff continues:

"Hereupon the restriction contained in the section of

the National Banking law comes into effect, without any interference or conflict with state laws; that is to say, a national bank 'may take, receive or charge a rate not exceeding *seven per centum*, and such interest may be taken in advance,' etc." (Then follow sections providing for penalty and forfeiture.) * * * By the laws of the State of New York, as expounded by her highest court, no rate of interest upon loans to a corporation is fixed or limited."

Thus, Judge Woodruff held with judicial emphasis that the Federal court would adopt the construction given to the New York statute by the courts of that state. We have *here* the construction of the Illinois statute by the Supreme court of that state, which finds in sections 1, 2, 4 and 5, a fixed statutory rate controlling national banks, as well as other corporations and restrict persons.

Counsel contend that the opinion of Judge Woodruff *in re* Wild was based upon *The First National Bank of Whitehall* v. *Lamb*, 50 N. Y., 95, and inasmuch as *Bank* v. *Lamb* had not been followed by latter decisions in the Court of Appeals, and had not been adopted by the Supreme court of the United States in a case subsequently decided by it, that the Wild case fell with it, and could have no force or effect in consideration of the case in argument. The conclusion of counsel is not sustained by an examination of the opinion. In his decision Judge WOODRUFF *only* refers to *Bank* v. *Lamb*, touching *one single question*, and of it said:

"It was not the intention of Congress, in enacting the National Banking Law, to authorize national banks, in respect to exacting interest, to violate the laws of the states within which they might be organized, nor, as I think, to relieve them from the consequences of such violation, prescribed by the state laws, if they were guilty thereof. This is the result of the decision of the Court of Appeals of the State of New York, in *First Nat. Bank* v. *Lamb* (56 N. Y., 95.. *Without* adopting the reason-

ing of the opinion in that case, I deem the conclusion as above stated correct."

Thus Judge Woodruff rejected the reasoning in the opinion in *Bank* v. *Lamb*, and simply accepted the conclusion above expressed by him, touching the part to which it referred, which did not involve the point here in argument. And Judge Woodruff did not cite *Bank* v. *Lamb* in support of his decision of the question here discussed, nor did he base his opinion upon the decision in that case. On the contrary, he cited it in support of his construction of the usury statutes of New York and the exemption of corporations from the penalties and forfeitures therein provided, *Rosa* v. *Butterfield*, 33 N. Y., 665, and *Belmont Bank* v. *Hoge*, 35 N. Y., 65.

In conclusion of the argument upon this point, I submit:

1. If the rates fixed, allowed and limited by sections 1, 2, 4 and 5 of our statutes *do not control* and *do not furnish the rate required in the first restriction of section 30 of the National Banking Act as to corporations, because* corporations cannot defend against their violation *and if there is no law in this state fixing rates as to corporations, and the rate fixed in the second restriction of the National Banking Act applies to and controls this case.*

2. That contracts of corporations in which a higher rate is named than that fixed in sections 1, 2, 4 and 5 of of our statute is not less a violation of such sections, because such corporations are prohibited from pleading usury.

3. A breach of law is no less a breach because the law fails to provide for or prohibits a particular defense.

4. Section 30 of the National Banking Act by *express* words, *express* limitations, *embraces* ONLY *rates fixed or allowed by the state law and* NOT *rates to be fixed by agreement of parties.*

Counsel has not produced a single authority, and I assert, with entire confidence, no case can be found in which any court has held that section 11, which withdraws from corporations the defense of usury, makes the usurious rate charged an unfixed "legal" rate in the presence of sections 1, 2, 4 and 5 of our statute and within the meaning of the national banking act. No case can be found in our state, nor in any other state, in which any court has held that a usurious rate is made a legal rate because the parties agreeing to it are prohibited from pleading the forfeiture of the entire interest.

Hines v. *Marmolejo*, 60 Cali., 229, and *National Bank* v. *Bruhn*, 64 Texas, cited by counsel, have no application to the points here involved upon the facts stipulated, in the presence of Sections 1 and 4 of our statute, expressly fixing the rate of interest that may be charged, received or recovered by persons or corporations on verbal or written contracts.

These two cases arose under the statutes of California and Texas, which only named a legal rate for verbal contracts, leaving parties free, with express, full, statutory authority, "*to contract for any rate of interest upon which "they might agree.*" I deem it unnecessary in the presence of sections 1 and 4 of our statute, which affirmatively fix and limit the rates for all verbal and written contracts, respectively, to discuss or consider the construction given by the courts of California and Texas to the statutes of those states, respectively, in the cases cited

by counsel. If these cases were applicable or could be treated as authorities pertinent to the questions in argument, it would be no difficult task, under the provisions of the national banking act and the authorities here cited, to establish the proposition that a rate to be voluntarily fixed and agreed upon between the parties is not a rate fixed, allowed and limited by state law within the meaning of section 30 of the national banking act.

V.

AS SHOWN, VERBAL AGREEMENTS ARE EXPRESSLY LIMITED BY STATUTE TO A RATE NOT EXCEEDING SIX PER CENTUM.

So plaintiff is limited to six per cent.. because the agreement was verbal, and it cannot recover in excess of that rate; that plaintiff has received the six per cent., and therefore nothing remains due from defendant to plaintiff upon this verbal contract; that even if it were a written contract and provided for the payment of eight and one-half per cent., the court would refuse to enforce it at that rate; would wholly disregard the agreement and allow plaintiff to recover six per cent., the legal rate, only, and that, it has already received.

The note was in writing and constitutes the sole contract between the parties, and no evidence of any contemporaneous verbal agreement is admissible to vary its terms.

The notes here shown provided for no rate of interest from their date of making to the date of maturity. Therefore the second section of the statute became a part of this written note and fixed the rate of interest at

six per cent. So that this written agreement, in which such statute fixing the rate was *inter*-written by operation of law, could not be changed by evidence of any contemporaneous verbal agreement. And so the Illinois Supreme court held in this case. (See its opinion, transcript 29.)

Said our Supreme court: "The oral agreement now sought to be enforced has relation merely to a portion of the interest, and as the agreement for interest was embodied in the note, the oral proof would only tend to show that the actual agreement of the parties in respect to interest was different from the one evidenced by the written agreement."

This the court held could not be done.

In conclusion, if this Honorable court should overrule our motion to dismiss, etc., we submit:

1st. That if counsel's contention is correct, namely, that section 11 eliminates all interest rates from the Illinois statutes as to corporations, thereby leaving corporations without fixed rates within the meaning of "fixed rates," as used in the national banking act, then plaintiff is limited to the seven per cent. rate fixed in that act, as held in *Johnson* v. *Bank*, *supra*.

2d. That if the statutes of this state fix no rate controlling the parties to this suit, then the rate fixed in the national banking act itself controls, and that rate having been exceeded, leaves plaintiff without remedy.

3d. That this court will adopt the construction given to the Illinois statutes by the Supreme court of that state, and that court having held that there is a fixed rate which controls in this case, notwithstanding the presence of section 11, and that that rate was exceeded, and the verbal agreement fixing it was void under the Illinois statutes, leaves this case without a federal question for disposition.

Respectfully submitted,

G. W. KRETZINGER,

For Defendant in Error.

APR 24 1896
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

October Term, A. D. 1895.

No. 254.

The Union National Bank of Chicago,
Plaintiff in Error,
vs.
Louisville, New Albany and Chicago Railroad Company,
Defendant in Error.

Error to Supreme Court of Illinois.

REPLY OF PLAINTIFF IN ERROR.

HENRY S. ROBBINS,
COUNSEL FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 52 DEARBORN ST., CHICAGO.

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REPLY OF PLAINTIFF IN ERROR.

The position of counsel for defendant in error seems to be that in Illinois *all* lenders (whether national banks, state banks or individuals) to corporations are by statute debarred from recovering from such corporations interest in excess of six per cent. on verbal contracts and eight per cent. on written contracts—this, notwithstanding the provision of the Illinois statute that "no corporation shall hereafter interpose the defense of usury in any action."

The manifest inconsistency between this claim and

statutory provision is sought to be gotten rid of by a novel, and untenable construction of the Illinois statute against usury, of which the foregoing statutory provision is one section.

It is this: the earlier sections of that statute (5 and 6), contained a general prohibition against a person or *corporation* taking more than eight per cent. interest. Section 7 requires the defense of usury to be pleaded. Section 11 prohibits a corporation from interposing the defense of usury. To defeat the recovery of the *entire* interest when in excess of the legal rate, the defense of usury must be pleaded. If not pleaded by an individual, a recovery of the entire interest cannot be avoided. As a corporation is debarred from interposing any defense of, and therefore from pleading usury, the recovery of the entire interest when at a ratio in excess of the legal rate can never be successfully resisted by a corporation. But, although the defense of usury cannot under the statute be interposed except by a plea, still without a plea the recovery of a *part* of the interest may be successfully resisted—that is, the defense of usury may be successfully interposed as to *part* of the interest although it is not by a natural person, and cannot be by a corporation, pleaded.

Interposing the defense of usury means preventing its recovery. This counsel concedes cannot be done by a corporation *in toto*, but may, he says, be done as to the interest in excess of the legal rate. Where a corporation has contracted for ten per cent. interest, it may, he says, escape payment of two per cent. of the ten per cent. on the ground of usury, but cannot escape payment of the other eight per cent. What is this but interposing the defense of usury as to the payment of the two per cent?

But for the usury statute the entire ten per cent. would be recoverable. It is solely by reason of that statute that the recovery of part could be defeated. What is this but escaping the payment of interest on the ground of usury, that is, interposing the defense of usury, which the statute expressly says a corporation cannot do?

According to counsel, this plain statutory provision is nullified in part by the *prior* sections of the same statute which prohibit any "person or *corporation*" from receiving interest in excess of the statutory rate. There may be an apparent repugnancy between this language and the clause prohibiting a corporation from interposing the defense of usury. This resulted, as shown in our original brief, from these provisions having been originally parts of different statutes. But if there be this repugnancy, the result according to the well established canons of construction must be, and is conceded by counsel to be (brief, p. 24,) that the later clause (section 11) repeals that part of the former which is inconsistent with it. That is, the word "corporation" in the general prohibitory clause would be nullified by the later section which prohibits a corporation from interposing the defense of usury.

But it is said by counsel that:

"The Illinois courts firmly hold that if a plea of usury is not interposed (as cannot be by a corporation) the contract for the usurious rate is still *unlawful* and *void*, which leaves the parties without any agreed rate, and therefore the statutory rate of six per cent. will apply."

That is, the law takes out of the contract the agreed rate and substitutes therefor the statutory rate. He reaches the *reductio ad absurdum* when he says (brief, p. 32):

"The notes here shown provided for no rate of interest

from their date of making to the date of maturity. *Therefore, the second section of the statute became a part of this written note and fixed the rate of interest at six per cent.*"

Were such a principle to be announced by the courts, it would surprise the commercial and banking world. Up to the present time it has been supposed that a note not providing for interest from date bore interest only from maturity.

But the Illinois courts have never decided as thus claimed by counsel. Before, however, coming to the consideration of the Illinois cases much light will be obtained upon this subject by considering the New York decisions.

This provision that "no corporation shall hereafter interpose the defense of usury in any action" was first enacted in New York State where it was passed in 1850 as an independent statute, apart from the general interest statute.

Three years thereafter and in 1853, it was first enacted in Illinois as an independent statute, and subsequently, upon a revision as stated in our original brief, incorporated into the present general interest statute of that state.

The intent and purpose of this statute very soon after its passage received the construction and consideration of the New York courts.

Thus in *Curtis* v. *Leavitt*, 15 N. Y., 151, the Court of Appeals said:

"The effect of the act of the 6th April, 1850, is to repeal the statute of usury, so far as it applies to corporations. The condition of this class of things becomes the same as if the usury laws never existed. The title of the repealing act is significant. It is, 'To prohibit corporations from interposing the defense of usury in any action.'

The first section then declares, in a few short, emphatic words that the defense of usury shall not thereafter be interposed. It is the defense which is prohibited. The barrier wall, the place of strength, which the usury laws set up between the lender and the borrower, is thrown down and leveled with the ground whenever the borrower is a corporation. Henceforth the law offers no rewards of bad faith and broken promises to this class of contractors. * * * The object of the act is to take away from corporate bodies the defense of usury—a defense which most men have come to regard as immoral, mischievous and unjust. It should have a liberal interpretation."

In the same case PAIGE, J., at page 228, said:

"The prohibition is, that no corporation shall, after the passage of the act, interpose the defense of usury in any action. This prohibition is not directed merely against pleading or proving the defense, but it is against interposing it, that is, either by plea or by proof, or by claiming the benefit of it at the trial or hearing. The statute was intended to embrace in the prohibition the setting up as a defense usurious agreements."

And in the same case SELDEN, J., at page 255, said:

"The intention obviously was to take away altogether from corporations the defense of usury. Proving usury upon the trial, setting it up at the hearing, is interposing it as a defense, no less than the pleading it."

In *Butterworth* v. *O'Brien*, 23 N. Y., 275, the court, through DAVIES, J., said:

"It is quite immaterial, when we look at the objects of the legislature, whether this claim by a corporation to avail itself of the statute be set up affirmatively or be interposed as a shield, when attacked by the other party to the usurious contract. *It was obviously the meaning and intent of the legislature to take away from corporations altogether all benefit or advantage resulting from the statute of usury.* As to them, it was as through it never had existence as a law. It was not thereafter to be used or taken advantage of by them, either as a weapon of attack or as a shield for defense."

It will thus appear that the New York statute, like that of Illinois, contained a general prohibition against persons and corporations taking more than the real rate fixed by the statute, and according to counsel for defendant in error, by reason of this general prohibition, the defense of the corporation was good *as to the excess above the legal rate*. But the Court in the above case decided that it was not good at all.

In *Rosa* v. *Butterfield*, 33 N. Y., 665, which is cited with approval by counsel for defendant in error, a suit was brought upon a note providing for interest at the rate of twelve per cent. This was usurious under the general prohibition of the interest statute of that state, and for that reason the note was by the lower court adjudged to be void for usury. The Court of Appeals, however, held the contract not usurious, as it was a note of a corporation, and by reason of the New York statute a corporation could not interpose the defense of usury. The court in declaring the effect of this statute said:

"In my judgment, the question on which these cases depend is, whether the act of 1850 has operated to make lawful the contract of a corporation for the loan of money to itself, which would otherwise be usurious. If it stops short of that effect, and leaves the contract still obnoxious to the vice of usury, though the corporation itself and its privies in estate are interdicted by statutory estoppel from saying so, I see no sound reason why the defendants may not assert the fact in their own defense. To make the contract lawful, the act must be held either to have effected a repeal of the usury laws as to the borrowing contracts of corporations, or to have made such contracts an exception to the operation of those laws. Rightly to consider this question, it is essential to apprehend the legal nature of usury. Usury is not now regarded as a crime in itself, or *malum in se*. Both as an offense against the laws and a defense to suits in court, it is dependent upon express statutes. As a defense, it is not

founded upon any common law right, either legal or equitable; and it is clearly within the power of the legislature to take it away." * * *

"If the law which creates the taint declare that it shall not be alleged to exist as to a certain class of contracts, or be asserted by a certain class of persons to annul their contracts, is not this quite equivalent to saying that those contracts are free from this taint and outside of its consequences? Properly collated, the statute becomes, in substance, that no person shall take usury, and all contracts which take or secure it shall be void; but no corporation shall ever allege usury to defeat its contracts. This, it seems to me, would be equivalent to declaring that the contracts of corporations shall not be subject to the provisions of this statute. If the statute had originally been framed with the act of 1850 incorporated in its restraining sections, it seems to me it would have been adjudged to have created an exceptional class of contracts not within or obnoxious to the offense of usury."

The court held that the note was not usurious, and the judgment was reversed. That is, the Court of Appeals adjudged the note good for the twelve per cent., and did not confine the interest to legal rate, as, according to counsel for defendant in error it should have done by reason of the general prohibition, which was substantially the same in New York as in the present Illinois statute.

The construction put upon the provision that "no corporation shall hereafter interpose the defense of usury in any action," by the Illinois courts, is equally against the present contention of counsel for defendant in error.

In 1862 the general interest statute of Illinois (see Revised Statutes of Illinois, chapter 54, page 371), provided:

"SEC. 2. In all contracts hereafter to be made, whether written or verbal, it shall be lawful for the party to stipulate or agree that ten per cent. per annum, or any less sum of money, shall be taken and paid * * * for

every hundred dollars of money loaned or in any manner due and owing * * * from any person or *corporation* to any other person or corporation of this state.

SEC. 3. If any person or corporation in this state shall contract to receive a greater sum of interest than ten per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due from such person or *corporation*."

At the same time there was in force a separate statute providing that "no corporation shall hereafter interpose the defense of usury in any action." *Id.*, 371.

In other words, this interest statute contained a general prohibition against taking more than ten per cent. interest, and hence according to counsel for defendant in error, the lender to a corporation notwithstanding the plain language of this other statute, could only recover ten per cent. But in

Hartford Ins. Co. v. *Hadden*, 28 Ill., 260,

decided in 1862, which was a suit based upon a contract of a corporation to pay in excess of ten per cent., the court refused to reduce the judgement which in the lower court had been for the full amount of interest, because the contract was that of a corporation, and by the statute no corporation could interpose the defense of usury. The court said:

"The language of the statute is so express and positive that it leaves no room for the courts to make exception to it."

In other words, the Supreme Court of Illinois, in a case whose facts called for the decision, decided that, notwithstanding the general prohibition against exceeding the general rate, recovery could be had from the corporation

for any agreed rate of interest by reason of the statutory inhibition against a corporation pleading usury.

If the counsel for defendant in error is right in his contention, this case was wrongly decided, in that it did not confine the lender to the statutory rate. Again, in

Am. Cent. R. R. Co. v. *Miles*, 52 Ill., 174,

the note of the corporation drew *fifteen* per cent., while the general interest statute contained a *general* inhibition (*Hamill* v. *Mason*, 51 Ill., 489), against taking more than *ten* per cent., and provided that if any person or corporation contracted to receive a greater rate than ten per cent., such persons or corporation should forfeit the whole of said interest so contracted to be received, and would be entitled only to receive the principal sum due such person or corporation. And it was insisted that this statute controlled. But the court held otherwise, saying (p. 177):

"But the act of 1853, by the first section, declared that 'No corporation shall hereafter interpose the defense of usury in any action.' This section, therefore, and not the act of 1857, governs this note. It was given by a corporation and it is expressly prohibited from interposing the defense. It was, therefore, *with the interest, a valid claim.*" That is, a valid claim for the amount of interest at the rate of fifteen per cent.

If the position of counsel for defendant in error is right the lender was in that case only entitled to recover ten per cent. In other words, that case is a direct decision of the Supreme Court of Illinois against the position now taken by counsel.

Thus, in two cases in which the point was necessary for decision the Supreme Court of Illinois has expressly decided that by reason of the inhibition of the corporation against interposing the defense of usury, a lender in Illi-

nois (not a national bank) to a *corporation* is entitled by reason of this statute to recover interest at the rate agreed upon, although in excess of the statutory rate.

No subsequent decision of the Supreme Court of Illinois has ever changed or modified these cases. They remain the law of Illinois today, and under this law this plaintiff in error, if not a national bank, would have recovered judgment in its favor in the trial court.

Counsel for defendant in error relies on *Farwell* v. *Meyer*, 35 Ill., 40, in support of his contention, but this case did not involve a loan to a *corporation*; hence the court did not decide the effect and scope of the statutory provision that, "no corporation shall hereafter interpose the defense of usury."

It did not decide, as claimed by counsel, that a corporation could interpose the defense of usury to the excess of interest above the legal rate.

The law in force, at the time of this decision, did not, as does the seventh section of the present interest statute of Illinois, require the usury to be set up by plea.

Stockham v. *Munson*, 28 Ill., 51.
Hamill v. *Mason*, 51 Ill., 488.

Thus, the Illinois Supreme Court in *Farwell* v. *Meyer*, was not construing either the statutory provision which is now section 11 of the present interest statute, or the statutory provision (enacted subsequent to that case), requiring usury to be pleaded, which is section 7 of that statute. Nor was the court deciding the joint effect of these two statutory provisions. In other words, *the question now under consideration did not arise in that case.*

The bill in that case was filed by the debtor for the

purpose of reducing a judgment entered by confession upon a promissory note by the amount of interest in excess of the legal rate which had been paid from time to time upon said note. As the borrower was seeking affirmative relief from a court of equity and was under the necessity of doing equity, that is, not insisting on the forfeiture of the entire interest, all he asked was that the unpaid balance of the debt should be reduced by the amount of the usurious part of the interest paid. The real question in the case was whether he could do that, it being the rule in Illinois that usurious interest when once paid could not be recovered back. The Supreme Court of Illinois held this could be done, and this is *all* that that court in that case did decide. The real point of the decision is thus expressed by the court:

"Although usurious interest voluntarily paid, since the passage of the act of 1857, cannot be recovered back, still, so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of the usury therefrom. The usury received is considered as having been extorted by means of the debt, and is to be applied in part payment of the same. So much of the note as the debtor was entitled to have satisfied by payments of usurious interest as was included in the judgment entered without notice, and in a manner affording him no opportunity of asserting his rights, he was entitled to have deducted, and to that extent the judgment should have been enjoined."

Counsel for defendant in error claims the opinion of the Illinois Supreme Court in the present case also decides that a lender other than a national bank is limited by the general prohibition to the statutory rate where the borrower is a corporation, although the latter by section 11 is debarred from interposing the defense of usury.

The language of the court is not clear in this opinion. Some general language in it may give color to the con-

tention of counsel for defendant in error, but this language is to be read with reference to the question before the court for decision, and, although general, is to be confined to that question. As said by this court in *St. Louis* v. *T. H. R. R.*, 145 U. S., 403:

"Upon questions discussed in the opinion and not necessary to the judgment or not considered at all, the case cannot be regarded as a decision."

What that court was called upon to decide was whether the words of section 5197 of the Federal statute, "interest at the rate allowed by the laws of the state," had reference only to the general provisions of the state statute or gave the national bank the benefit of sections 7 and 11 of that statute. All that court decides is that in the case of a lender which is a national bank, section 11 does not debar the borrowing corporation from the benefit of the defense of usury.

What the law of Illinois is when the lender to a corporation is not a national bank, the Illinois Supreme Court did not, in its opinion in the present case, decide, because that question was not before it. What the law of Illinois in such case is had already been established by that court by its two decisions above referred to.

The extent of the decision contained in the opinion of the Illinois Supreme Court in the present case is to be determined not only from that opinion but from the other decisions of that court, as well as by the statute of that state.

Thus, by the decision in the present case, the Illinois Supreme Court has decided that a *national bank* could not, and by the two foregoing decisions that other lenders could, recover from a corporation interest in excess of

the general statutory rate. In other words, the decision of the Illinois Supreme Court in this case is a discrimination against national banks in Illinois.

In considering the language of that court's opinion in the present case, it should be read, not only with reference to, but should be confined to the facts before it, that is, the case of a national bank. It must be assumed that in that opinion that court had no intention of overruling its former decisions, or of nullifying the statute of the state.

That opinion should be considered upon the assumption that the court did not intend to be inconsistent with itself, and intended to render an intelligent and sensible decision. This cannot be, if the claim of counsel for defendant in error, of the extent of that decision, is well founded. He would have us believe that the court intended to nullify the plain language and purpose of section 11, and intended, *without apparently knowing it*, to overrule the settled law of the state as established in its other decisions.

If the state court's opinion in this case were cited to this court in another case it would not be accorded this scope.

Counsel seems to be in doubt as to the meaning of the words "defense of usury." What is meant by these words is set at rest by section 7 of the state statute declaring it to be "stating that he (person relying on the defense) intends to defend against the contract sued upon or set-off on the ground that the contract is usurious."

Counsel says (brief, p. 23), that if the contract had been specifically set out in the declaration such a recital

would have defeated the suit. This is inaccurate. If the contract had been set out in the declaration and were usurious, still that would not have defeated a recovery unless usury was pleaded, and this under section 11 could not be done in this case.

Respectfully submitted.

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